No. 02-1809 Status: GRANTED
Title: J. Elliott Hibbs, Director, Arizona Department of Revenue, Petitioner
v.
Kathleen M. Winn, et al.
Docketed: June 16, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-15901)
Decision Date: October 3, 2002
Rehearing Denied: March 5, 2003

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 3 2003	Petition for writ of certiorari filed. (Response due July 16, 2003)
Jun 27 2003	Supplemental brief of petitioner filed.
Jul 15 2003	Waiver of right of respondents Kathleen M. Winn, et al. to respond filed.
Jul 16 2003	DISTRIBUTED for Conference of September 29, 2003.
Jul 16 2003	Brief amici curiae of California, et al. filed. (Distributed)
Jul 23 2003	Response Requested . (Due August 22, 2003)
Aug 22 2003	Brief of respondent Kathleen M. Winn, et al. in opposition filed. (Distributed)
Sep 2 2003	Reply of petitioner J. Elliott Hibbs, Director, Arizona Department of Revenue filed. (Distributed)
Sep 30 2003	Petition GRANTED.
Nov 3 2003	SET FOR ARGUMENT Tuesday, January 20, 2004.
Nov 6 2003	Record received from the U.S.C.A. - 9th Circuit. (1 folder)
Nov 13 2003	Brief amicus curiae of Trent Franks, et al. filed.
Nov 14 2003	Brief amicus curiae of United States filed.
Nov 14 2003	Joint appendix filed.
Nov 14 2003	Brief of petitioner J. Elliott Hibbs, Director, Arizona Department of Revenue filed.
Nov 14 2003	Brief amici curiae of California, et al. filed.
Nov 14 2003	Brief amici curiae of Council of State Governments, et al. filed.
Nov 18 2003	Record received from the U.S.D.C. for Arizona. (1 box)
Nov 21 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 26 2003	CIRCULATED.
Dec 17 2003	Brief amicus curiae of NAACP Legal Defense & Education Fund, Inc. filed. (Distributed)
Dec 19 2003	Brief of respondents Kathleen M. Winn, et al. filed. (Distributed)
Dec 19 2003	Brief amicus curiae of Americans United for Separation of Church and State filed. (Distributed)
Jan 9 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 13 2004	Reply of petitioner J. Elliott Hibbs, Director, Arizona Department of Revenue filed. (Distributed)
Jan 20 2004	Argued. For petitioner: Samuel Goddard, Attorney General, Phoenix, Ariz.; and on behalf of the United States, as amicus curiae, Thomas G. Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: Marvin S. Cohen, Scottsdale,

Ariz.

FILED
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OFFICE OF THE CLERK

No. ——

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err in holding, in conflict with the First, Sixth, and Eleventh Circuits, that the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity that traditionally restrain federal judicial interference with state tax systems do not require district courts to dismiss constitutional challenges to state tax credits that directly impact the administration of a State's tax system?

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PETITION FOR A WRIT OF CERTIORARI

J. Elliot Hibbs, in his official capacity as Director of the Arizona Department of Revenue (State),[1] respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on March 5, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 307 F.3d 1011 (9th Cir. 2002), and is reprinted at Appendix (App.) 11. The denial of rehearing en banc and Judge Kleinfeld's dissent from that denial, which was joined by Judge O'Scannlain, is reported at 321 F.3d 911 (9th Cir. 2003), and is reprinted at App. 1. The district court's unreported decision is reprinted at App. 27.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its judgment and opinion on October 3, 2002. The Ninth Circuit denied the request for rehearing en banc on March 5, 2003. This petition has been filed

[1] J. Elliott Hibbs became the Director of the Arizona Department of Revenue on January 6, 2003, replacing Mark W. Killian. Accordingly, he has been substituted as a party pursuant to Supreme Court Rule 35.3.

within ninety days of the denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Tax Injunction Act (TIA), 28 U.S.C. § 1341, provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." Section 43-1089, Arizona Revised Statutes (A.R.S.), allows Arizona taxpayers to reduce their State tax liability by claiming a credit for amounts they have already paid to a "school tuition organization." The complete text of A.R.S. § 43-1089 is set forth at App. 37.

STATEMENT OF THE CASE

The TIA prohibits district courts from "enjoin[ing], suspend[ing], or restrain[ing]" the "assessment, levy or collection" of any state tax where a "plain, speedy and efficient remedy" is available in state court. 28 U.S.C. § 1341. This case presents a question that has divided the courts of appeals: whether the TIA and principles of comity require that the district courts dismiss constitutional challenges to state tax provisions that directly impact the administration of a State's tax system but do not interfere with the collection of revenue.

The Ninth Circuit held that the TIA and principles of comity do not apply to the Plaintiffs' challenge of Arizona's "school tuition organization" (STO) credit merely because

they seek to enjoin the granting of a tax credit, rather than the collection of state revenue. The Ninth Circuit's conclusion conflicts with the decisions of the First, Sixth, and Eleventh Circuits and this Court, ignores the statutory language of the TIA, which bars restraints on the *assessment* of taxes in addition to the *collection* of taxes, and disregards traditional notions of federalism.

The Ninth Circuit's overly narrow construction of the TIA and principles of comity will result in increased and duplicative federal court litigation involving all aspects of state tax administration despite plain, speedy, and adequate state court remedies. This case is a prime example of this unnecessary duplication. In 1999, two years after the enactment of A.R.S. § 43-1089, the Arizona Supreme Court provided a thoughtful and scholarly opinion on the same issues raised by the Plaintiffs in this case and this Court denied certiorari. *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999). According to the Ninth Circuit, however, those same issues must now be relitigated in federal district court. This Court should grant certiorari to address the circuit conflict and to clarify that the TIA and principles of comity preclude federal court interference with the administration of a State's tax system.

A. Statement of Facts.

In 1997, the Arizona Legislature enacted A.R.S. § 43-1089. (App. 12). That statute allows taxpayers to reduce their state tax liability by claiming a credit for amounts they have already paid to a school tuition organization ("STO"). Specifically, the statute permits any person owing

$500 or more in Arizona income taxes in any tax year to reduce their state tax liability by up to $500 if a contribution is made to an STO. (App. 28). The Arizona Legislature raised the maximum credit allowed for a married couple to $625 per year, effective January 1, 2001. (App. 12). STOs must use the donated funds to provide scholarships to students attending private elementary and secondary schools in Arizona, including religious schools. (App. 12-13, 28)

The Plaintiffs are Arizona taxpayers who allege that A.R.S. § 43-1089 violates the First and the Fourteenth Amendments of the United States Constitution because it authorizes the use of funds raised through state taxation to provide direct support for religious education. (App. 13, 29). Plaintiffs' suit seeks a declaration that the STO program violates the Establishment Clause and an injunction prohibiting the State's future operation of the program. (App. 13-14, 29). A different set of plaintiffs raised the same argument in the Arizona Supreme Court. *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999). The court held that A.R.S. § 43-1089 did not violate the Establishment Clause. *Id.*

B. Proceedings Below.

The Plaintiffs brought this action in the United States District Court for the District of Arizona to challenge the constitutionality of A.R.S. § 43-1089. The district court granted the State's motion to dismiss on the grounds that it had no subject-matter jurisdiction to hear the matter under the TIA and, alternatively, under the principles of comity. (App. 12, 36). The court found persuasive the Sixth

Circuit's interpretation of the TIA in *In re Gillis*, 836 F.2d 1001, 1005 (6th Cir. 1988), and held that the jurisdictional bar imposed by the TIA was not limited to lawsuits that challenge the collection of taxes. (App. 31). The court reasoned that the language of the TIA is not limited to the collection of taxes, noting that "[b]y preventing restraints on both the assessment and collection of taxes, Congress indicated that the TIA is not limited to collection only but was intended to encompass the process that the state uses in its determination of tax liability." (App. 31). The court determined that, when the State offers tax credits to reduce tax liability, the credits become an integral part of the State's assessment of each taxpayer's liability and thus any determination that A.R.S. § 43-1089 is unconstitutional would restrain the State's ability to assess taxes in accordance with its state tax system. (App. 31).

The court also held that even "[a]ssuming the tax credits are not covered by the specific language of the TIA, the underlying principles of comity and equitable restraint that are embodied in the [TIA] prevent this Court from exercising jurisdiction over the action." (App. 34) (citing *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108 (1981), and *Gillis*, 836 F.2d at 1005). "Recognizing the importance of state autonomy not only to collect taxes but also to administer its taxing system in accordance with state priorities and needs," the court concluded that Plaintiffs had "an adequate remedy available in the Arizona state courts and for that reason, the principles of comity require[d] Plaintiffs to utilize that remedy to challenge A.R.S. § 43-1089." (App. 35).

On appeal, the Ninth Circuit reversed, holding that the TIA and the principles of comity did not bar Plaintiffs' challenge to Arizona's tax credit. (App. 26). The court

narrowly defined "assessment" as used in the TIA to mean estimating the value of property or income as a basis for taxation or imposing a tax or other charge. (App. 16). Thus, the court concluded that a credit plays no role in the "assessment" of property or income as a basis for the imposition of taxes because it is applied after a taxpayer's gross income is determined. (App. 17).

The court also held that the Plaintiffs' suit is not barred by the principles of comity because it did not involve the collection of a tax. The court distinguished this Court's holding in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943), that comity prohibits federal courts from interfering with state tax administration, asserting that this Court's statements to that effect were dicta. (App. 23-25). Finally, the court placed the burden on the State to demonstrate that federal review of its tax statutes will harm it. (App. 26). The court then held that the State failed to identify a harm here that would render federal review unacceptably intrusive on its sovereignty. (App. 26).

In accordance with the Ninth Circuit's sua sponte order dated November 12, 2002, the parties filed supplemental briefs addressing whether the Ninth Circuit should rehear the case en banc. (App. 1). The State urged the court to grant rehearing. In a published order dated March 5, 2003, the court declined to rehear the case en banc. (App. 1). Judge Kleinfeld dissented from the denial and Judge O'Scannlain joined. (App. 2).

In his dissent, Judge Kleinfeld found that the panel's decision "sharply limits the traditional restraints on federal judicial interference with state tax systems and is in conflict with the position of the Sixth Circuit." (App. 2).

Judge Kleinfeld disagreed with the panel's narrow definition of the term "assessment" in the TIA and instead defined it as the process of calculating a person's final tax bill after all deductions and credits are accounted for, which is consistent with its definition in the federal income tax code, lay dictionaries, tax treatises, and law dictionaries. (App. 3-4). He found that, under this definition of assessment, "the Tax Injunction Act deprives the federal courts of jurisdiction to enjoin states from granting tax credits as part of the calculation due." (App. 5).

Judge Kleinfeld also determined that the doctrine of comity necessitated overturning the panel's decision. (App. 6). He found that under this doctrine, "federal district courts are required to dismiss claims asserting challenges to state tax systems, whether they are constitutional or not, and whether they are technically within the [TIA's] ban or not, so long as there is an adequate state remedy available." (App. 7).

REASONS FOR GRANTING THE WRIT.

I. Review Is Warranted to Resolve the Conflict in the Circuits Over Whether the Tax Injunction Act and Principles of Comity Prohibit Challenges to State Tax Provisions that May Result in Increased Revenue.

The Ninth Circuit's decision conflicts with decisions of the First, Sixth, and Eleventh Circuits, which have concluded that the TIA and principles of comity bar federal

court jurisdiction even when the result of deciding a state tax dispute would be to increase taxes.[2] *See United States Br vers Ass'n, Inc. v. Perez*, 592 F.2d 1212 (1st Cir. 1979); *Gillis*, 836 F.2d at 1005; *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242 (11th Cir. 1991). The interpretation of the First, Sixth, and Eleventh Circuits is consistent with this Court's interpretation of the TIA in *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

The Sixth Circuit rejected the argument that the TIA should be construed narrowly to apply only when the federal action would interfere with the collection of state taxes. *Gillis*, 836 F.2d at 1005. In *Gillis,* the plaintiffs sought an injunction ordering tax officials to assess all real and personal property owned by coal, oil, and gas interests at full fair cash value. 836 F.2d at 1003. The plaintiffs alleged that the tax officials had violated their right to equal protection by assessing other taxpayers at less than full fair cash value, while plaintiffs were taxed at full value. In other words, the plaintiffs sought to have the court order the state officials to tax other taxpayers more. The plaintiffs argued that neither the TIA nor comity applied because their requested relief would enhance, not restrain, the collection of taxes. *Id.* at 1007-08. The court found it unnecessary to decide the TIA issue, because

[2] The Ninth Circuit relied on the Seventh Circuit's decision in *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986). The court also noted two district court cases that were consistent with its conclusion: *Rojas v. Fitch*, 928 F.Supp. 155 (D.R.I. 1996), *aff'd on other grounds*, 127 F.3d 184 (1st Cir. 1997), and *Moton v. Lambert*, 508 F. Supp. 367, 368 (N.D. Miss. 1981). Those decisions, like the Ninth Circuit's decision, are inconsistent with the language of the TIA and this Court's broad interpretation of the TIA.

comity required the dismissal of the action. *Id.* at 1005. Nevertheless, the Sixth Circuit rejected the plaintiffs' narrow construction of the TIA. *Id.* ("We do not believe that the *Grace Brethren* ruling was as narrow as respondents contend.")

In addition, the Sixth Circuit rejected the plaintiffs' narrow construction of the doctrine of comity. *Id.* at 1009 ("[T]he very maintenance of respondents' suit unduly intrudes on administration of the State's tax system.") The *Gillis* court specifically rejected the argument that comity should not be invoked if an action may result in an order to state tax officials that could increase taxes. Instead, it focused on the underlying policy that federal courts should not decide state tax issues:

> [W]hile ultimately respondents claim they seek to force the collection of additional taxes, the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax; and the expense to the state in defending the action is identical . . . .
>
> . . . [I]t is noteworthy that the district court would be forced to issue a declaratory judgment finding that virtually all property owners in the state of Kentucky had been deprived of their right to equal protection. . . . While respondents insist that such a ruling would work no damage to the fiscal system of the state – since the remedy would be reassessment of those who have been underassessed, rather than refunds to respondents – we cannot logically conclude that no harm would result from a ruling that property assessments have been unconstitutionally administered for years.

836 F.2d at 1008.

Similarly, in *Perez*, 592 F.2d at 1215, the First Circuit found that a federal anti-tax injunction statute applicable to Puerto Rico, which contains essentially the same language as the TIA,[3] prohibits relief that requests an order that some taxpayers be taxed more. The court concluded: "[A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations." *Id.*

The Eleventh Circuit has characterized the argument that the TIA does not apply when the requested relief would enlarge tax revenues as "overly literal and technical." *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242 (11th Cir. 1991). In that case, the court noted that the "requested relief, if granted, would require a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system." *Id.* The court further found such intervention would "clearly conflict with the principle underlying the Tax Injunction Act that the federal courts should generally avoid interfering with the sensitive and peculiarly local concerns surrounding state taxation schemes." *Id.* The court concluded that the claims were subject to the jurisdictional bar of the TIA. *Id.* at 1243.

The Ninth Circuit acknowledged that the Sixth Circuit "gave a different reading to the Tax Injunction

[3] "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico." *Perez*, 592 F.2d at 1213 (quoting 48 U.S.C. § 872).

Act," but incorrectly found that *Gillis* was distinguishable. (App. 21 n.7). The panel's conclusion that *Gillis* sought interference with a State's tax assessment, but that this case did not, was based on its erroneous definition of "assessment." *Id.* This case too, involves an "assessment," as that term is used in the TIA. "Assessment" is commonly defined as the act of determining tax liability. *See, e.g., Webster's Encyclopedic Unabridged Dictionary* 125 (1996). This case and *Gillis* both involve challenges that affect a determination of tax liability under state law and therefore involve the assessment of taxes. Consequently, the Ninth Circuit's decision directly conflicts with the Sixth Circuit's reasoning in *Gillis*.

Further, like the relief requested in *Gillis*, *Perez*, and *Colonial Pipeline*, the relief requested here, if granted, will affect hundreds of thousands of Arizona taxpayers, leaving their tax liability uncertain until the case is finally decided. It will significantly interfere with the administration of the Arizona income tax. The TIA and comity require Plaintiffs to pursue their case in the Arizona courts. Because the reasoning of the Ninth Circuit conflicts with the different interpretation of the TIA and principles of comity by the First, Sixth, and Eleventh Circuits, this Court should grant the writ to resolve the conflict. *See* Supreme Court Rule 10(b).

II. The Ninth Circuit's Decision Conflicts with the Plain Language of the Tax Injunction Act and the Decisions of This Court Interpreting It and the Principles of Comity.

The Ninth Circuit held that the Plaintiffs' suit does not interfere with the State's ability to assess taxes because, if they are successful, the State will actually collect

more money. (App. 22). This narrow interpretation of the TIA is unsupported by the language of the statute and this Court's application of the principles of comity in federal challenges to the administration of state taxes.

The language of the TIA prevents the district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy *or* collection" of any state tax. 28 U.S.C. § 1341 (emphasis added). Congress plainly intended to restrict federal court jurisdiction over state tax disputes that interfere with the assessment as well as the collection and levy of taxes.

This Court has concluded that the "[e]nactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal court intervention in state government," and the "federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes without undue interference from the Federal Judiciary." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826-827 (1997). This Court therefore construes the terms and policy of the TIA broadly to avoid interference with state tax administration, in whatever form. Thus, although the TIA does not prohibit declaratory judgment actions challenging state taxes, this Court has held that such relief is barred. *Grace Brethren Church*, 457 U.S. at 408-09; *see also Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995) (section 1983 actions are generally allowed in state courts, but "the background presumption that federal law generally will not interfere with administration of state taxes leads us to conclude that Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law").

This Court has also recognized that the equitable principles that preclude federal courts from interfering with the administration of state taxes predate and survive the enactment of the TIA. *See Nat'l Private Truck Council*, 515 U.S. at 590 ("[t]he Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation"); *Grace Brethren*, 457 U.S. at 412 (noting "the historical reluctance of the federal courts to interfere with the operation of state tax systems if the taxpayer had available an adequate remedy in the state courts"); *Fair Assessment*, 454 U.S. at 110 ("the principle of comity which predated the Act was not restricted by its passage"). In *Fair Assessment*, this Court thus found that "the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Id.* at 114.

In spite of the inclusive language of the TIA and this Court's expansive interpretation of it, the Ninth Circuit narrowly defined the term "assessment" as used in the TIA and held that it did not apply to the determination of a tax credit. (App. 16). The Ninth Circuit incorrectly defined "assessment" to mean the imposition of a tax or valuing property for purposes of taxing that property. (*Id.*). "Assessment," however, is the act of determining tax liability. *See, e.g., Webster's Encyclopedic Unabridged Dictionary* 125 (1996) ("assess" – "1. to estimate officially the value of (property, income, etc.) as a basis for taxation. 2. to fix or determine the amount of (damages, a tax, a fine, etc.")); *Webster's Third New International Dictionary* 131 (1981) ("assessment" means "the entire plan or scheme fixed upon for charging or taxing"); *Black's Law Dictionary* 116-17 (6th Ed. 1990) (defining "assessment" as "determining the share of tax to be paid by each of many persons").

"Assessment" has an equally broad meaning in the United States Code and is not the same as collection. 26 U.S.C. § 6201(a)(1) (the Secretary shall assess all taxes shown on tax returns); 26 U.S.C. § 6203 ("assessment shall be made by recording the liability of the taxpayer"). As noted by Judge Kleinfeld, Congress understands the term "assessment" to refer to the bottom line, that is, "how much money the taxpayer owes to the government in taxes, after consideration of any credits as well as deductions." (App. 4-5).

There can be no "assessment" of income tax until all deductions and credits have been taken into account because a taxpayer's tax liability is not determined until the end of the calculation. Thus, an injunction that orders the State to disallow tax credits actually enjoins or restrains the State from "assessing" the tax due under state law and is prohibited by the TIA. Consequently, the Ninth Circuit erred in holding that the phrase "restrain the assessment" in the TIA applies only to acts that will result in the collection of revenue. The challenged tax credit is an integral part of the tax assessment process, as are the dozens of other credits and deductions allowed by Arizona law. Because Plaintiffs' requested relief would restrain or, at a minimum, suspend the assessment of state income tax, it is barred by the TIA.

Given the language of the TIA and this Court's expansive interpretation of it and the principles of comity that underly it, the Ninth Circuit erred in defining its terms narrowly to exclude the TIA's application to this case. This Court should grant review to correct the error.

III. The Question Presented Is an Important One that Warrants This Court's Review.

This case strikes at the very heart of federalism. The principles of comity that Congress codified in the TIA articulate a well-reasoned approach to resolving state tax controversies without interference by the federal courts. This Court recognized long ago that taxpayers' attempts to thwart state tax administration through federal court challenges hindered the States. *Great Lakes Dredge & Dock Co.*, 319 U.S. at 297-98. The TIA and principles of comity strike a perfect federalism balance by providing for non-interference with state tax administration in the federal courts *except* where state remedies are not "plain, speedy and efficient." In order for federal court jurisdiction to exist, a party must show that either the state law provided no "speedy and efficient remedy" or that Congress intended for the challenge to be an exception to the TIA. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20 n.21 (1983). By building in this procedural safeguard, Congress established policy that significantly limited the federal court's jurisdiction to interfere in the administration of state taxes.

Plaintiffs have an adequate remedy at state law and have never argued that the Arizona court system is not "plain, speedy and efficient." Indeed, the Arizona Supreme Court has already determined the issues raised by plaintiffs. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999). The Ninth Circuit's holding shows little regard for the ability of state courts to decide matters involving the federal Constitution. This lack of confidence in the ability of state court judges to decide federal issues is inconsistent with bedrock principles of

American jurisprudence and this Court's repeated statements. For example, Justice Powell commented that the Court was "unwilling to assume that there now exists a general lack of appropriate sensitivity to [federal] rights in the trial and appellate courts of the several States" and that "there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his neighbor in the state courthouse." *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (citation and internal quotation marks omitted). Judge Kleinfeld echoed this same sentiment in his dissent from the en banc denial: "State judges take the same oath to uphold the federal Constitution that [federal judges] do, and like [federal judges] are subject to federal Supreme Court review." (App. 8). Thus, he concluded, "[t]here is no excuse for relitigating the constitutionality of Arizona's tuition tax credit in federal court." (*Id.*)

Finally, this Court's final review over state court decisions involving federal issues provides the necessary check on erroneous decisions. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996) (constitutional challenge to state tax dismissed in federal court under the TIA and ultimately heard by the Court on certiorari from the Alabama court). Thus, there are procedures that provide an appropriate role for federal courts, while ensuring that state tax disputes are generally resolved in state, rather than, federal courts. Consequently, the Ninth Circuit erred in holding to the contrary. This Court should grant review to reverse that decision.

CONCLUSION.

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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321 F.3d 911

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer,

Plaintiffs-Appellants,

v.

MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,

Defendant-Appellee.

No. 01-15901

D.C. No. CV-00-00287-EHC

ORDER

Filed March 5, 2003

Before: Mary M. Schroeder, Chief Judge, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

Order: Dissent by Judge Kleinfeld

ORDER

A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35. The request for rehearing en banc is denied.

KLEINFELD, Circuit Judge, with whom Circuit Judge O'SCANNLAIN joins, dissenting from denial of rehearing en banc:

The decision in this case sharply limits the traditional restraints on federal judicial interference with state tax systems and is in conflict with the position of the Sixth Circuit. Despite the Tax Injunction Act and federal common law on comity to the contrary, the panel held that a federal court has jurisdiction to declare a state tax statute unconstitutional and enjoin its application, so long as the effect of the judgment would be to cause the state to collect more revenue rather than less.

The Arizona statute at issue grants a tax credit of up to $500 a year for taxpayer contributions to "school tuition organizations."[1] This is similar to tax deductions for contributions to nonprofit schools, except that it is a credit against taxes owed and not merely a deduction from income subject to taxation. The credit can only offset taxes; no check is mailed by the state to the taxpayer or anyone else.[2] The panel manifested concern that taxpayers were claiming most of the tuition credit for tuition they paid to religious schools.[3]

The Tax Injunction Act says: "The District Courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of

[1] Ariz.Rev.Stat. § 43-1089(A).

[2] *Id.* at § 43-1089(B).

[3] *See Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir.2002).

such state."[4] The decision in this case holds that the challenge to the Arizona tax statute isn't a challenge to an "assessment," because the word refers only to estimation of the value of property or income and imposition of a tax thereon.[5]

Even under this definition, the decision's reasoning does not support its holding. The tax credit amounts to a decision by the Arizona legislature that a taxpayer's income does not include money the taxpayer contributes to a school tuition organization (like a deduction), and goes further than a deduction only in subtracting the amount "above the line," from taxes, rather than below the line. Tax credits are commonly used, by Arizona as well as other states, to encourage conduct (such as installing solar water heaters, in Arizona[6]) even among lower-earning taxpayers who do not itemize deductions.[7] So understood, the tuition credit does indeed amount to an "assessment," because it is an element of the Arizona tax system's estimation of the value of income and imposition of a tax thereon.

The panel's narrowing construction of the Tax Injunction Act ought to have been rejected. The panel relied on definitions of "assessment" from a lay dictionary.[8] Had they looked in a different lay dictionary, the panel would

[4] 28 U.S.C. § 1341 (2000).

[5] *Winn*, 307 F.3d at 1015.

[6] Ariz.Rev.Stat. § 43-1090.

[7] *See id.* at § 43-1041.

[8] *Winn*, 307 F.3d at 1015 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 90 (1979)).

have found a definition contrary to the one it preferred, such as "the entire plan or scheme fixed upon for charging or taxing."[9] There would be no way to argue sensibly that the Arizona tuition credit wasn't part of "the entire plan or scheme fixed upon for charging or taxing." This broader definition comports with the ordinary meaning of "assessment" as the process of calculating a person's final tax bill after all deductions and credits are accounted for.

Had the panel considered tax treatises and law dictionaries to determine what "assessment" meant, it would have found much in accord with this broader definition. For example, "assessment" is defined as "determining the share of a tax to be paid by each of many persons."[10] It is also defined as "the process of ascertaining and adjusting the shares respectively to be contributed by several persons"[11] such as an individual's final tax bill. Plainly, Arizona uses the tuition credit as a means of determining the amount of tax to be paid by each person.

Even the federal income tax code supports a broad reading of "assessment." The federal income tax code provides that "assessment shall be made by recording the liability of the taxpayer."[12] Thus, under the congressional understanding in the tax code, "assessment" refers to the bottom line, how much money the taxpayer owes to the government in taxes, after consideration of any credits as

[9] WEBSTER's THIRD NEW INTERNATIONAL DICTIONARY 131 (1981).

[10] BLACK'S LAW DICTIONARY 116-17 (6th Ed.1990).

[11] *Id.* at 116.

[12] 26 U.S.C. § 6203 (2002).

well as deductions. There is no reason to think that Congress meant something narrower in the Tax Injunction Act than it did in the Internal Revenue Code. Under this understanding of the meaning of "assessment," plainly the Tax Injunction Act deprives the federal courts of jurisdiction to enjoin states from granting tax credits as part of the calculation of taxes due.

The district court dismissed the case in light of the general understanding federal judges have long had of the broad scope of the Tax Injunction Act. As the Supreme Court put it in *Rosewell v. LaSalle National Bank*: "The Tax Injunction Act generally prohibits federal district courts from enjoining state tax administration except in instances where the state court remedy is not plain, speedy and efficient."[13] This broad understanding does not allow for the niggardly parsing of the word "assessment" adopted by our panel. The Supreme Court and lower courts have interpreted the Tax Injunction Act broadly, declining federal jurisdiction provided that an adequate remedy existed in the state courts.[14]

The panel cites only one case in support of its view that the Tax Injunction Act doesn't speak to cases where, if the plaintiff succeeds, the state will collect more taxes. But the Seventh Circuit case cited, *Dunn v. Carey*,[15] doesn't

[13] *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981).

[14] *See, e.g., California v. Grace Brethren Church*, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *In Re Gillis*, 836 F.2d 1001 (6th Cir.1988).

[15] 808 F.2d 555 (7th Cir.1986).

speak at all to tax credits. And it doesn't construe the term "assessments." It was a dispute about whether taxpayers could use federal court to enjoin local taxes imposed pursuant to a federal consent decree.[16]

Even if the Tax Injunction Act did not require that the panel's holding be overturned, established federal common law of comity would. As the Supreme Court has noted, the Tax Injunction Act "reflect[s] the fundamental principle of comity between federal courts and states governments that is essential to 'Our Federalism.'"[17] *Rosewell* teaches that "even where the Tax Injunction Act would not bar federal court interference with state tax administration, principles of federal equity may nevertheless counsel withholding of relief."[18] Indeed, long before Congress passed the Tax Injunction Act, federal courts ordinarily declined jurisdiction over challenges to state taxes.[19] Congress certainly had a special concern about federal judicial decisions that would directly interfere with collection of state taxes. But Congress did not reject the already established broader principles of federalism and equity protecting states from federal judicial meddling in their

[16] *See id.* at 557-58.

[17] *Fair Assessment in Real Estate Ass'n. v. McNary,* 454 U.S. 100, 103, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981).

[18] *Rosewell,* 450 U.S. at 525 n. 33, 101 S.Ct. 1221 (citing *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 301, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943)).

[19] *See, e.g., Matthews v. Rodgers,* 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932); *Singer Sewing Machine Co. v. Benedict,* 229 U.S. 481, 33 S.Ct. 942, 57 L.Ed. 1288 (1913); *Boise Artesian Water Co. v. Boise City,* 213 U.S. 276, 29 S.Ct. 426, 53 L.Ed. 796 (1909).

tax systems.[20] The Supreme Court recognized this in *Fair Assessment in Real Estate Ass'n v. McNary.*[21] Regardless of the Tax Injunction Act, the *Fair Assessment* Court held, as a matter of comity, that damages actions cannot be brought under 42 U.S.C. § 1983 to redress unconstitutional administration of state tax systems, because of the disruptive effect such actions would have on state tax systems.[22]

What this means, as a practical matter, is that federal district courts are required to dismiss claims asserting challenges to state tax systems, whether they are constitutional or not, and whether they are technically within the Tax Injunction Act's ban or not, so long as there is an adequate state remedy available. The district court did just what the law requires. The panel does not contend that state law in Arizona, administered by our colleagues on the Arizona courts does not afford an adequate remedy for unconstitutionality. Nor could they, as Arizona provides a means to challenge its tax code and allows parties to raise federal constitutional challenges to its provisions. Indeed, this very tax credit was challenged on constitutional grounds throughout the Arizona courts. The Arizona Supreme Court provided a thoughtful and scholarly opinion on the merits of the constitutionality of the tax credit at issue in this case.[23] The Arizona Supreme Court is reviewed,

[20] *See, e.g., Fair Assessment in Real Estate Ass'n.,* 454 U.S. at 102-03, 102 S.Ct. 177 (discussing the state autonomy aspects of the Tax Injunction Act).

[21] 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981).

[22] *Id.* at 115-16, 102 S.Ct. 177.

[23] *See Kotterman v. Killian,* 193 Ariz. 273, 972 P.2d 606 (Ariz.1999).

as we are, by the Supreme Court of the United States, and, having had the Arizona Supreme Court decision brought to its attention, the Supreme Court of the United States declined to grant certiorari.[24]

State judges take the same oath to uphold the federal Constitution that we do, and like us are subject to federal Supreme Court review. We have no justification for supposing that only we few – among all the judges of the nine states in our circuit – read, understand, or apply the United States Constitution faithfully. The implication of the panel's remark about "the federal courts' role as 'guardians of the people's federal rights'"[25] seems to be that we are the *only* such guardians, or that we are guardians of the Platonic sort. We are not. There is no excuse for relitigating the constitutionality of Arizona's tuition tax credit in federal court.

As to comity, the panel decision conflicts with the Sixth Circuit's decision in *In Re Gillis*.[26] *Gillis* found it unnecessary to decide whether the Tax Injunction Act required dismissal of a challenge to state assessment practice, because "even if the facts of a state tax matter do not technically fall within the language of § 1341, the federal courts should restrain from interfering in state proceedings."[27] *Gillis* points out that even if the effect of

[24] *Kotterman v. Killian*, 528 U.S. 921, 120 S.Ct. 283, 145 L.Ed.2d 237 (1999) (denying certiorari on the Arizona Supreme Court's decision).

[25] *Winn*, 307 F.3d at 1017 (citation omitted).

[26] 836 F.2d 1001 (6th Cir.1988).

[27] *Id.* at 1005.

the federal remedy sought would be to increase taxes collectible (which was true in *Gillis*) state resources would be diverted to litigation, payment of costs and attorneys fees, and such measures as the federal court ordered to attain that relief.[28] The same is plainly true in the case at bar.

The panel opinion expresses what appears to be disdain for what it calls "isolated statements" and "dicta" by the Supreme Court in *Great Lakes* and *Fair Assessment*. I do not find it necessary to parse the Court's opinions in these cases to determine whether we can wash what they say away as dicta, because the principles enunciated are so clear and uncontradicted. We ordinarily treat Supreme Court dicta, if it is dicta, with considerable and appropriate deference.[29] And I am not so sure that the Supreme Court decisions can be properly distinguished. The *ratio decidendi* of *Fair Assessment* – disruption of state tax systems – largely applies to the case at bar. As in *Fair Assessment*, a determination that the state tax scheme was unconstitutional "would halt its operation" and "would hale state officers into federal court."[30] It was halting the system's operation and the haling of state officers into federal court that the *Fair Assessment* Court fastened on as the reason for its holding, not simply revenue collection. *Fair Assessment* held "such interference to be

[28] *Id.* at 1007-08.

[29] *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir.1996); *see also McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 19 (1st Cir.1991).

[30] *Fair Assessment in Real Estate Ass'n*, 454 U.S. at 115, 102 S.Ct. 177.

contrary to 'the scrupulous regard for the right independence of state governments which should at all times actuate the federal courts' "[31] because "the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States" as long as the federal right may be litigated in the courts of the states.[32]

In sum, the panel decision applies a highly unconventional approach to the Tax Injunction Act and the comity principles underlying it, to justify an unprecedented interference with state assessment of taxes. It creates a conflict on comity with our sister circuit, the Sixth. It disdainfully tosses away all that the Supreme Court has said on the issue as mere dicta. And as a result, the states and municipalities of our circuit can expect to spend a lot of their money and tax personnel's time on constitutional litigation in the federal courts, regardless of the remedies provided by our learned colleagues in the states' courts.

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[31] *Id.* at 116, 102 S.Ct. 177 (quoting *Matthews v. Rodgers*, 284 U.S. 521, 526, 52 S.Ct. 217, 76 L.Ed. 447 (1932)).

[32] *Matthews*, 284 U.S. at 525-26, 52 S.Ct. 217.

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307 F.3d 1011

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer,

Plaintiffs-Appellants,

v.

MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,

Defendant-Appellee.

No. 01-15901

D.C. No. CV-00-00287-EHC

OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
June 11, 2002 – San Francisco, California

Filed October 3, 2002

Before: Mary M. Schroeder, Chief Judge, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

Before: SCHROEDER, Chief Judge, D.W. NELSON and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge.

This case raises the question of when the federal courts may entertain constitutional challenges to state tax laws. Appellants, who are Arizona residents and taxpayers, contend that an Arizona statute permitting tax credits for contributions that support parochial schools violates the Establishment Clause. The district court granted the state's motion to dismiss on the basis that the Tax Injunction Act divests the federal courts of subject matter jurisdiction in this case, and on the basis of general principles of comity and federalism. Neither the statute nor the doctrines relied on by the district court bar Appellants' action. Because Appellants do not challenge any of the types of procedures specified in the Tax Injunction Act, and because they seek to enjoin the granting of a tax credit, rather than the collection of state revenue, the action is justiciable in federal court.

I. BACKGROUND

The statute at issue in this case is Arizona Revised Statute § 43-1089 (hereinafter "§ 1089"). Enacted in 1997, the law permits state tax credits for contributions to organizations called "school tuition organizations." ("STOs"). Section 1089 provides that STOs must be charitable organizations under § 501(c)(3) of the Internal Revenue Code. The tax credit program works as follows: Each Arizona taxpayer may receive a tax credit of up to $500 for the amount of voluntary contributions he or she makes to STOs in any single year; married couples filing jointly may receive a credit of up to $625. § 1089(A)(1)-(2).

There are several limits on the activities of STOs. The organizations are required to spend at least 90% of their revenue on educational scholarships or grants for children

in order to allow those children to attend a private school, including parochial schools. § 1089(E)(3). An STO is not permitted to dispense all of its scholarships or grants to students attending the same school; the statute provides that recipients of an STO's funds must be drawn from at least two different schools. *Id.* A taxpayer cannot request that a contribution to an STO be used for the direct benefit of his dependent. § 1089(D). Finally, an STO cannot distribute grants or scholarships to students who attend schools that discriminate on the basis of race, color, handicap, familial status, or national origin. § 1089(E)(2).

There are no other limits on how STOs operate; thus, an STO may distribute grants only to students attending Catholic schools, Protestant schools, Muslim schools, Jewish schools, or schools maintained by any other single religious sect. STOs may also limit their grants to children of families who belong to a particular faith – Catholic children, Protestant children, Muslim children, or Jewish children, for example. The total amount of funds available for STO grants (and the concomitant revenue loss to the state) is limited only by the number of taxpayers who elect to contribute, rather than pay the amount of their contributions as taxes.

Appellants contend that the tax credit scheme is an impermissible government subsidy of religious schools in violation of the First and Fourteenth Amendments of the Constitution. They point out that under the tax credit system, a substantial amount of money that would otherwise be received by the state and be available for funding public education and other essential public services is diverted to religious institutions to be used for the promulgation of particular religious views. Appellants filed this action in February, 2000, seeking a declaration that the

STO program violates the Establishment Clause of the First Amendment; they also requested an injunction both enjoining the future operation of the program, and requiring the return to the state's general fund of monies already distributed to (but not yet expended by) STOs.

In their complaint, plaintiffs described how the STO tax scheme has worked in practice:[1] In calendar year 1998, the first full year that the tax credit was in effect, STOs reported to the Arizona Department of Revenue that they had received $1.8 million in contributions. At least 94% of that amount was donated to STOs that restrict their scholarships or grants to students attending religious schools; three religious STOs received 85% of the donations made that year. The principal beneficiary of the funds that otherwise would have been paid to the state as tax revenues was the Catholic Diocese of Phoenix.[2] The program expanded significantly in 1999, its second year of operation; according to plaintiffs, the Catholic Diocese of Phoenix alone received $4.5 million for its STO that year,

[1] Because the district court dismissed the case for lack of jurisdiction pursuant to Rule 12(b)(1), for purposes of this appeal the facts as stated in the complaint must be accepted as true. *Wilkins v. United States*, 279 F.3d 782, 784 n. 1 (9th Cir.2002).

[2] The largest single recipient in 1998 was the Catholic Tuition Organization of the Diocese of Phoenix, which received $ 837,140 of the $1.8 million in diverted funds. That organization provides tuition assistance to students attending Catholic schools run by the Catholic Diocese of Phoenix. The second largest single recipient was an STO that restricts its grants to students attending evangelical Christian schools. The third was an STO that restricts its grants to Brophy College Preparatory School, a Catholic all-boys' high school, and its sister school, Xavier College Preparatory School for girls.

and the Catholic Diocese of Tucson reported more than $850,000 in donations as a result of the tax scheme.

The STO program was challenged in the Arizona courts as soon as it was enacted. The program was upheld as constitutional by the Arizona Supreme Court, in a 3-2 decision. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606, *cert. denied*, 528 U.S. 921, 120 S.Ct. 283, 145 L.Ed.2d 237 (1999). Plaintiffs assert that principles of res judicata do not bar the instant action, and defendants have not raised a res judicata defense either here or in the district court.

Arizona[3] moved to dismiss the complaint on two grounds: (1) on the basis of Eleventh Amendment immunity; and (2) on the basis of a lack of subject matter jurisdiction resulting from the Tax Injunction Act, 28 U.S.C. § 1341, as well as from principles of comity. Simultaneously, a number of parties sought intervention in the lawsuit. The district court granted the motion to dismiss on the ground that the Tax Injunction Act as well as comity preclude federal jurisdiction over plaintiffs' claim; it did not rule on either the motions to intervene or the Eleventh Amendment argument. A timely appeal was filed.

II. DISCUSSION

A. Tax Injunction Act

The Tax Injunction Act precludes district courts from interfering with a state's "assessment, levy, or collection"

[3] The nominal defendant in this action is Mark W. Killian, who is sued in his official capacity as Director of the Arizona Department of Revenue. For simplicity, in this opinion we refer to the defendant as "Arizona."

of state taxes where an efficient remedy is available in state court.[4] Arizona does not contend that any relief that the district court might order in this case would interfere with a "levy" or "collection" of any taxes. Rather, it asserts that the Tax Injunction Act bars this action because the STO tax credit is part of Arizona's general system of tax "assessment." In other words, according to Arizona, the tax credit is part of the overall calculus by which the state determines how much revenue it will receive from each taxpayer. This broad reading of the word "assessment," however, is supported neither by any precedent interpreting "assessment" in this manner, nor by the meaning of the word itself. The term "assessment" has two definitions relevant to the question presented in this case: (1) "to estimate officially the value of (property, income, etc.) as a basis for taxation," and (2) "to impose a tax or other charge on." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 90 (1979). Neither definition of the term describes the role of the STO tax credit in the Arizona tax system: (1) the STO credit available to a taxpayer is a uniform amount that is applied to the calculation of taxes *after* a taxpayer's gross income has been determined and therefore plays no part in the "assessment" of property or income as a basis for the imposition of taxes,[5] and (2) the

[4] The Tax Injunction Act provides in its entirety as follows:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1341.

[5] All taxpayers, regardless of their tax bracket or adjusted gross income, may receive up to the standard sums of either $500 or $625 in tax credits for STO contributions (depending on the taxpayer's filing

(Continued on following page)

challenged practice is not the imposition of a tax; quite the contrary, it is the grant of a benefit in the form of an excuse from paying a portion of the taxes already assessed.

The district court agreed with Arizona's contention that the STO credit constitutes a "tax assessment," and that this action is consequently barred. It stated that *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir.1989), compelled its conclusion. *Blangeres*, however, involved a federal lawsuit in which individuals sought to prevent a company from disclosing documents that were necessary to the state's valuation of certain taxable assets belonging to a corporation. Thus, the suit affected the state's ability to determine the value of a taxpaying entity's taxable income, or to "assess" the assets as the term is defined in the first of the two definitions set forth above. In short, *Blangeres* held that a lawsuit challenging the methods by which the state obtains information used for the valuation of taxable property is barred by

status and the amount of his contributions to STOs). Whatever a taxpayer contributes to an STO is subtracted directly from his tax bill *after* his income is assessed and his tax liability calculated. From a purely financial perspective, then, a taxpayer is unaffected by his decision as to whether or not to make an STO contribution. The funds that he may contribute will be unavailable to him in any event: they will be used either to make the contribution or to pay the taxes he owes. We note that a tax credit differs from a tax deduction in that where a tax deduction is involved, giving money to a religious institution is not, as is the case of a tax credit, a free gift. In the case of a tax credit, the taxes due are reduced by the full amount of the gift. In contrast, when a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved: it is only his taxable income that is reduced by the amount of the gift, and, thus, his tax liability is reduced only by a percentage of the gift that is equal to the tax rate applicable to his income bracket.

the Tax Injunction Act, because any relief would prevent the state from accurately assessing taxes. *Blangeres* does not support defendant's argument here.

Moreover, if plaintiffs were to receive the relief that they seek in this action, there would be no violation of the purposes or policy underlying the Tax Injunction Act. Congress sought to implement two purposes when it passed the Act in 1937. They are well-documented in both the legislative record and in subsequent cases. *See, e.g., Aluminum Co. v. Department of Treasury,* 522 F.2d 1120, 1124 (6th Cir.1975); *Hargrave v. McKinney,* 413 F.2d 320, 326 (5th Cir.1969). The first purpose, which is not relevant to the instant appeal, involves the discriminatory effect of diversity jurisdiction in tax cases.[6]

The second, more relevant purpose was to prevent disruption of a state's efforts to collect tax revenues. That concern is clearly expressed in the committee reports prepared when the Act was under consideration in Congress:

[6] Congress sought to eliminate an advantage that existed for foreign parties: prior to passage of the Act, such individuals or corporations could sue a state for injunctive relief in federal court on the basis of diversity jurisdiction and avoid paying the disputed tax until the challenge was resolved. In contrast, state residents – because they are not diverse – were forced to seek redress only in state courts, which typically required a party to pay a disputed tax first, and challenge it thereafter. S.Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). ("If those to whom the federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the federal courts need only pay what they choose and withhold the balance during the period of litigation.").

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt state and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

S.Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937). See also *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 527, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) (explaining that if injunctive relief prohibiting the collection of a state tax was available, then "during the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency."); RICHARD H. FALLON, ET AL, HART AND WECHSLER's THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1216-17 (4th ed. 1996) (In passing the Tax Injunction Act, Congress was "concerned that taxpayers, with the aid of a federal injunction, could withhold large sums, thereby disrupting governmental finances.").

We have not previously addressed the scope of the Tax Injunction Act with respect to suits challenging tax credits. We have, however, recognized on a number of occasions that a fundamental concern of the Act is ensuring that state coffers do not become bare as a result of federal court

injunctive action. For instance, in *Dillon v. State of Montana*, 634 F.2d 463 (9th Cir.1980), we held that a refund action was barred by the Tax Injunction Act because a federal court order requiring a state to grant a tax refund is functionally equivalent to an order preventing the collection of taxes. When determining whether federal court injunctive action is permissible under the Act, *Dillon* stated that a federal court is to look at "[t]he practical effect on state fiscal operations" of the federal court order that plaintiffs seek. *Id.* at 466. *See also Poer & Co., et al. v. Counties of Alameda, et al.*, 725 F.2d 1234, 1235 (9th Cir.1984) (holding that jurisdiction does not exist to entertain an action for an injunction that would result in a tax refund). We applied the same "practical" approach in *Bidart Brothers v. California Apple Commission*, 73 F.3d 925, 930 (9th Cir.1996), in which we held that certain state agency fees did not constitute "taxes" for purposes of the Act, principally because they were not "assessments that if enjoined would threaten the flow of central revenues of state governments. . . ."

Applying that functional analysis here, we hold that a federal action challenging the granting of a state tax credit is not prohibited by the Tax Injunction Act. The invalidation of a tax credit, such as the one at issue here, does not adversely affect the state's ability to raise revenue. If the STO tax scheme were to be struck down on Establishment Clause grounds, Arizona's ability to raise revenue would not be diminished; to the contrary, it would be enhanced. Thus, if the district court were ultimately to rule for the plaintiffs on the merits, the Act's primary policy of non-interference with state revenue collection would not be undermined in any way.

Arizona essentially argues that the Tax Injunction Act bars *any* federal litigation regarding the constitutionality of state taxes. Even if the STO tax credit is not an assessment, Arizona argues, the Tax Injunction Act's general policy of non-interference with state tax matters counsels against allowing this action to proceed. Such a broad reading of the Act is inconsistent with our precedent, the language of the Act, the legislative purpose set forth above, and the federal courts' role as "guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

We agree with the interpretation of the Tax Injunction Act adopted by the Seventh Circuit. That court, like ours, applies a searching analysis of the *effect* of federal litigation on the state's ability to collect revenues, and will only bar the adjudication of a federal constitutional claim in federal court if a judgment for the plaintiffs will hamper a state's ability to raise revenue. *Dunn v. Carey*, 808 F.2d 555 (7th Cir.1986).[7] In *Dunn*, the plaintiffs' requested

[7] We note that the Sixth Circuit in *In Re Gillis*, 836 F.2d 1001 (6th Cir.1988), gave a different reading to the Tax Injunction Act. In *Gillis*, the court stated that if a suit "unduly intrudes on administration of the State's tax system," then it is precluded by the Act. *Id.* at 1009. In that case, the plaintiffs challenged Kentucky's system of tax assessment of coal, oil, and gas interests, charging that such properties were systematically underassessed for tax purposes. The *Gillis* plaintiffs contended that their claims were not foreclosed by the Tax Injunction Act because if they prevailed, it would lead to *increased* tax revenues for the state. The Sixth Circuit rejected this argument, taking a broad view of the scope of the Act's limit on federal court jurisdiction. Nevertheless, despite its broad language, the Sixth Circuit's decision is distinguishable from the case before us, because the court in *Gillis was* asked to do precisely what the Tax Injunction Act forbids – to interfere with a state's "*assessment*" of a tax, one of the three state functions specified in

(Continued on following page)

relief, as here, would have resulted in the state's collecting more tax revenue than it would have otherwise. The Seventh Circuit held that for that reason the action was not barred by the Tax Injunction Act, and rejected a broad interpretation of the Act that would govern "any federal litigation touching on the subject of state taxes." *Id.* at 558. *Dunn* continued: "[t]he text of [the Act] does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise additional taxes." *Id.* The same holds true here where Appellants' requested relief would result in the elimination of a tax credit – and, accordingly, produce more revenues for Arizona.[8]

In sum, we hold that because plaintiffs attack the grant of a tax credit, which is not one of the three types of state tax procedures barred from challenge in federal court by the Tax Injunction Act, the district court erred in

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§ 1341. Here no interference with any of the functions specified in the statute is involved.

[8] The reported cases factually most similar to this one are two district court cases. In *Rojas v. Fitch*, 928 F.Supp. 155 (D.R.I.1996), affirmed on other grounds, 127 F.3d 184 (1st Cir.1997), the court held that an Establishment Clause challenge to a state tax exemption was *not* barred by the Tax Injunction Act. It held:

> It is clear from the very text of the statute that it is not applicable in this instance. The present action is not an action to "enjoin, suspend or restrain" the collection of taxes. In fact it is quite the opposite. This is, in essence, an action to compel the State of Rhode Island to collect taxes.

928 F.Supp. at 159. *See also Moton v. Lambert*, 508 F.Supp. 367, 368 (N.D.Miss.1981) (plaintiffs' challenge to a tax exemption for racially segregated schools is not barred by the Tax Injunction Act because, if successful, would have the effect of increasing state revenues).

dismissing the action pursuant to that Act. Equally important, the relief requested by plaintiffs in this action would not hinder Arizona in its ability to impose taxes or collect revenue, but in fact would result in the state's receiving more funds that could be used for the public benefit. The Tax Injunction Act does not preclude federal courts from taking actions designed to increase the revenues available to the states, nor to remove unconstitutional barriers to the states' collection of the full amount of taxes they have levied or assessed.

B. Comity

The district court held as an alternative ground for its dismissal of this action that principles of comity preclude lawsuits involving potential federal court interference in the administration of state tax systems. The district court held that a federal court action that disrupts the domestic tax policy of a state is barred by principles of comity, regardless of whether the action relates to the collection of taxes, to tax deductions, or to tax credits. This broad bar to the litigation of federal constitutional claims in federal court is unsupported by precedent, and we reject it.

The Supreme Court has twice held federal jurisdiction to be barred by the doctrine of comity in cases in which state tax measures were challenged. Both, however, are cases in which the plaintiffs sought to stop the collection of a tax; thus, they are fundamentally different from the instant case.

In the first, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), the plaintiffs challenged a Louisiana tax on dormant commerce clause grounds, and sought a declaration that it

was invalid. Although the then-newly-passed Tax Injunction Act only bars injunctive relief by federal courts, the Supreme Court held that the Act merely codified preexisting principles of comity that prevent interference with the states' collection of revenue. Thus, comity required the dismissal of the declaratory judgment action for the same reason the Tax Injunction Act was enacted. *Id.* at 297, 63 S.Ct. 1070. "[T]he federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers *from collecting state taxes* where state law affords an adequate remedy to the taxpayer." *Id.* (citing *Matthews v. Rodgers,* 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932)) (emphasis added).

Arizona cites isolated statements from *Great Lakes* in support of its broad theory of comity. Such dicta is of limited significance. For instance, it is true that in *Great Lakes,* the Court stated that "[i]t is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Id.* at 298, 63 S.Ct. 1070. This statement alone, however, does not warrant expanding the doctrine of comity from precluding actions that affect the ability of states to raise revenue, to precluding *all* actions that relate to state tax administration, including actions designed to prevent the violation by the states of fundamental First Amendment guarantees. Indeed, the statement on which the state relies is generally applicable to any constitutional challenge to state law in federal court. It is not limited to state tax cases. Surely, the dicta did not mean that federal courts should not protect the constitutional rights of

individuals against the implementation of unlawful state policies. Further, the dicta states only that federal courts should not "needless[ly] obstruct" state domestic policies. Ordinarily, however, when the policies that the state is enforcing are unconstitutional, precluding their application is not "needless" but necessary.

The second of the Supreme Court's comity cases involving the constitutionality of state tax laws is *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). There, plaintiffs alleged that a state's property tax assessment procedures did not comport with due process, and sought damages from the tax collectors pursuant to 42 U.S.C. § 1983. The Supreme Court held the suit to be barred by comity principles. Although the action was not directly prohibited by the Tax Injunction Act because plaintiffs sought damages under § 1983 rather than injunctive relief, the Court held that "petitioner's action would 'in every practical sense operate to suspend collection of the state taxes. . . .'" *Id.* at 115, 102 S.Ct. 177 (quoting *Great Lakes,* 319 U.S. at 299, 63 S.Ct. 1070).

In *McNary,* as in *Great Lakes,* the federal action was dismissed because it would have hindered the state's ability to collect revenue. In particular, the *McNary* Court expressed concern that a judgment for plaintiffs would have had a significant ripple effect on a number of state tax provisions that depended on the challenged assessment procedure, and would have unduly constrained the activities of state officials implementing that procedure due to the fear of potential liability under § 1983, as well as an aversion to the burden of defending § 1983 actions. In contrast, an ultimate judgment on the merits for plaintiffs here – much less the conduct of this litigation – would have

no effect at all on the implementation of any other Arizona tax provisions, nor would it chill the activities of Arizona tax collectors. The STO credit is a limited, discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes in other ways, and would, in fact, produce substantial additional revenue for the state. Although it, like any state statute, expresses the policy views of the state of Arizona, and thus should not be lightly disregarded, in this case Arizona identifies no harm that renders federal court review of this statute any more intrusive on the state's sovereignty than the review of any other state statute that is alleged to be unconstitutional. Accordingly, comity does not bar plaintiffs' attempt to vindicate the important constitutional rights at issue.

CONCLUSION

Because both the Tax Injunction Act and the doctrine of comity, as it has been applied to federal tax cases involving state tax laws, are primarily concerned with federal litigation that interferes with the ability of the states to raise necessary tax revenues, they are inapplicable here. Accordingly, we REVERSE the district court's grant of Arizona's motion to dismiss and REMAND the case for further proceedings.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer,; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs, vs. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	)	No. CIV-00-287-PHX-EHC **ORDER**

Pending before the Court is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. [Dkt. 3]. Defendant argues that the Tax Injunction Act and the Eleventh Amendment divest this Court of jurisdiction to hear this action. Plaintiffs filed a Response claiming that neither the Tax Injunction Act nor the Eleventh Amendment applies to this action. [Dkt. 14]. For the reasons that follow, the Court finds that the Tax Injunction Act and the principles of comity divest the Court of subject matter jurisdiction to hear this case.

I. Background:

Plaintiffs filed this action on February 15, 2000 challenging the constitutionality of A.R.S. §43-1089 ("§43-1089")

under the First and Fourteenth Amendments. Section 43-1089 allows any taxpayer who pays Arizona income tax to receive a tuition tax credit for up to $500 of his annual tax liability. Under §43-1089 taxpayers can pay up to $500 of their tax liability for a given year to a "student tuition organization" ("STO") rather than paying that amount to the State of Arizona. Each STO uses the tax dollars to provide tuition grants to students attending the non-public schools that the STO is affiliated with. For every dollar that is paid to a STO, the taxpayer is given a dollar for dollar credit. Section 43-1089 places no limit on the amount of funds that can be diverted to STO's through tax credits. In addition, the credit is available to all taxpayers; there is no requirement that the taxpayer have any children in school or have incurred any educational expenses.

Under §43-1089, STO's have two obligations. First they are required to use at least 90% of the payments they receive from taxpayers for tuition grants to children who attend private primary or secondary schools in Arizona. Second, they must make tuition grants available to students at more than one non-public school.

Plaintiffs allege that the largest STO's are religious organizations that restrict their donations to religious non-public schools which in turn, use these funds to promote religious education and worship. As an example, Plaintiffs claim that in 1998 at least $1,708,769 of $1,815,799 collected from taxpayers went to STO's that restrict tuition grants of state funds to students attending religious schools. Plaintiffs argue that because the STO's are dominated by religious organizations that restrict grants to religious schools, parents who wish to send their children to a non-religious private school may be unable to

find an STO that is willing to make a tuition grant to a non-religious private school. Plaintiffs allege that, as it is currently operating, the tax credit authorized by §43-1089 allows state revenues to fund education in a religiously-preferential manner in violation of the First and Fourteenth Amendments.

Plaintiffs seek preliminary and permanent injunctive relief, a declaratory judgment that §43-1089, on its face and as applied, violates the First and Fourteenth Amendments, and that STO's which make tuition grants to only one religious denomination return grants to the State of Arizona general fund.

II. Motion to Dismiss Standard

When considering a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. *Peat Marwick Main & Co. v. Tew*, 486 U.S. 1055 (1988). The court should not grant a motion to dismiss "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citations omitted).

III. Discussion

A. The Tax Injunction Act

Defendant, in his Motion to Dismiss, argues that the Tax Injunction Act, ("TIA") deprives this Court of jurisdiction. The TIA, 28 U.S.C. §1341, provides in relevant part:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any

> tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

The Supreme Court has clearly held that the TIA prohibits a district court from issuing a declaratory judgment holding state tax laws to be unconstitutional. *See California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (holding that with regard to collection actions the TIA prohibits district courts from issuing a declaratory judgment that a state tax law is unconstitutional). Plaintiffs argue, nonetheless, that this language from *Grace Brethren*, and similarly the language of the TIA, is limited to holding that declaratory relief is only unavailable when injunctive relief is unavailable; that is, only when the collection of state taxes is interfered with.[1] *See In re Gillis*, 836 F.2d 1001, 1004-1005 (6th Cir. 1988).

Plaintiffs, in essence, argue that the TIA is limited to actions that implicate the collection of taxes. Therefore, Plaintiffs argue, because the present case involves a tax credit, and does not implicate the collection of taxes, the TIA does not apply. The Seventh Circuit and the District of Rhode Island have adopted this interpretation of the TIA. *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986); *Rojas v. Fitch*, 925 F.Supp. 155 (D.R.I. 1996). The Sixth Circuit has, however, rejected this narrow interpretation of the TIA

[1] Neither party argues that a plain, speedy and efficient remedy to resolve this dispute is unavailable in Arizona state courts. In fact, an identical challenge to the constitutionality §43-1089 has been rejected by the Supreme Court of Arizona. *See Kotterman v. Killian*, 972 P.2d 606 (1999), *cert. denied* 528 U.S. 921 *cert. also denied by Rhodes v. Killian*, 528 U.S. 810.

and has instead construed the TIA more broadly, applying the language in *Grace Brethren* to state tax laws that do not involve collection of state taxes. *In re Gillis*, 836 F.2d at 1005.

This Court, for several reasons, finds the Sixth Circuit's interpretation of the TIA more persuasive and finds that the jurisdictional bar imposed by the TIA and discussed in *Grace Brethren* was not limited to the collection of taxes. First, the TIA, as evidenced by the language of the Act, is not limited to the collection of taxes. *In re Gillis*, 836 at 1005. By preventing restraints on both the assessment and collection of taxes, Congress indicated that the TIA is not limited to collection only but was intended to encompass the process that the state uses in its determination of tax liability. Therefore when the state offers tax credits to reduce tax liability, the credits become an integral part of the State's assessment of each taxpayer's liability. For this reason, any determination that A.R.S. §43-1089 is unconstitutional would restrain the State's ability to assess taxes in accordance with its state tax system.

This Court's conclusion is supported by decisions where the Ninth Circuit has broadly defined the term "assessment" to prevent district courts from exercising jurisdiction in other cases involving state taxes. *See Aston v. Cory*, 780 F.2d 816, 821 (9th Cir. 1986) ("The Court has long recognized the dangers inherent in disrupting the administration of state tax systems and the corresponding need for federal court restraint when deciding cases that will affect these delicate state operations"). Thus, in *Blangers v. Burlington Northern, Inc.*, the Ninth Circuit held that the TIA applied to indirect as well as direct restraints on assessment of taxes. 872 F.2d 327 (9th Cir.

1989) (holding that the district court properly dismissed a claim for lack of jurisdiction under the TIA because granting an injunction against railroad employers from disclosing their employees' earning records and other tax related information to tax authorities would constitute a restraint on the state's assessment of taxes). Additionally, the Ninth Circuit has recently held that an action that seeks federal court intrusion, such as an injunction preventing the assessment board's review hearing to go forward, into the state's taxation process divests the district court of jurisdiction. *Jerron West Inc. v. State of California State Board of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1998).

Second, the legislative history of the TIA and the case law interpreting the TIA direct the Court to broadly construe the TIA in accordance with the strong federal policy of non-interference with state taxing authority.[2] An example of this reasoning is *Fair Assessment in Real Estate Ass'n Inc. v. McNary*, 454 U.S. 100, 108 (1981). In *Fair Assessment*, the United States Supreme Court expanded the jurisdictional bar imposed by the TIA to cover declaratory actions even though the TIA did not expressly provide for this prohibition. *Id.* The Court explained that

[2] The Court notes that similar challenges to state tax credits have been considered by District Courts and have proceeded up to the United States Supreme Court where they were ultimately decided upon their merits. *See Committee for Public Education v. Nyquist*, 413 U.S. 756, 789-98 (1973); *See Muller v. Allen*, 463 U.S. 388 (1983). Although these actions involve similar challenges to state tax laws, there is no evidence that any of the Courts considered the applicability of the TIA, and consequently the Court does not rely upon the exercise of jurisdiction in those cases to establish jurisdiction in the present case. *See Doe v. Madison School District*, 177 F.3d 789, 795 (9th Cir. 1999) (stating that "the exercise of jurisdiction does not establish jurisdiction").

nothing in the legislative history of the TIA, and its predecessor 28 U.S.C. § 1342, suggests that Congress intended to limit federal-court deference in state tax matters to those activities enumerated within these sections. *Fair Assessment*, 454 U.S. at 110 (citing H.R.Rep.No. 1503, 75th Cong., 1st Sess., 1 (1937); 81 Cong. Rec. 1415 (1937)). The Supreme Court went on to state its reasons for broadly construing the TIA, "[t]he scrupulous regard for the rightful independence of state government . . ., and a proper reluctance to interfere . . . with their fiscal operations, require that [injunctive] relief should be denied in every case where the asserted federal right may be preserved without it." *Id.* (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)). The Supreme Court also noted that the TIA should be applied to prevent the disruption of operation of the state taxing scheme by preventing plaintiffs from summoning state tax officials into federal court to defend their tax assessments. *Fair Assessment*, 454 U.S. at 114. Later, the Supreme Court affirmed its prior reading of the TIA: "Given the strong background presumption against interference with state taxation, the TIA may be understood as but a partial codification of the federal reluctance to interfere with state taxation." *National Truck Council Inc., v. Oklahoma Tax Commission*, 515 U.S. 582, 590 (1995).

The TIA has also been similarly construed by the Ninth Circuit. In *Poer and Co. v. Counties of Alameda*, the Ninth Circuit found the TIA applicable to actions for refunds or damages even though the language of the TIA does not specifically cover these actions, finding that federal court consideration of these actions would deprive the TIA of its full intended effects. 725 F.2d 1234, 1236 (9th Cir. 1984). The court went on to hold that the rule

codified within the TIA was intended to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems. *Id.* (citing *Dillion v. State of Montana*, 634 F.2d 463 (9th Cir. 1980).

Because the same concerns are present when district courts consider the constitutionality of tax credits as when they consider the constitutionality of state tax laws that provide for collection of taxes, the district court would risk interfering with state sovereignty and seriously disrupting the state taxation scheme.

Accordingly, this Court finds that the phrase "restrain the assessment" in the TIA divests the Court of jurisdiction to issue a declaratory judgment which has the potential to invalidate a state tax law giving a tax credit.

B. Comity

Assuming the tax credits are not covered by the specific language of the TIA, the underlying principles of comity and equitable restraint that are embodied in the Act prevent this Court from exercising jurisdiction over the action. *See Fair Assessment*, 454 U.S. at 108; *see also In re Gillis*, 836 F.2d at 1005. The importance of federal courts avoiding the obstructing [sic] the domestic policies of the states has been clearly and consistently recognized by the Supreme Court in other cases involving the TIA. As early as 1943 the Supreme Court recognized, "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the court of the United States. If the remedy at law is plain adequate and complete, the aggrieved party is left to that remedy in the state courts." *Great Lakes*

Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) (Citations omitted).

In *Roswell v. LaSalle National Bank*, 450 U.S. 503, 552 (1976) and *Fair Assessment*, 454 U.S. at 105, the Supreme Court reiterated the importance of withholding equitable relief to preserve comity. In *Rosewell*, the Court stated that even where the TIA would not bar federal court interference in state tax administration, principles of equity may counsel withholding relief. 450 U.S. at 525, n. 33. In *Fair Assessment*, the Supreme Court, while recognizing the strong federal policy underlying § 1983 permitting the vindication of constitutional violations by state officials in federal court, the Court found that the principle of comity controlled and prevented the Court from hearing a claim of unconstitutionality of state tax law where an adequate state remedy was available. 454 U.S. at 107. Similarly, in *Ashton*, the Ninth circuit found the principles of comity and deference to the state tax administration were paramount to the considerable interest of uniformity in interpreting §522(e)(1) of ERISA. 780 F.2d at 822.

Here, the principles of comity also take precedence. Recognizing the importance of state autonomy not only to collect taxes but also to administer its taxing system in accordance with state priorities and needs, the Court concludes that Plaintiffs have an adequate remedy available in the Arizona State Courts and for that reason, the principles of comity require Plaintiffs to utilize that remedy to challenge A.R.S. §43-1089.

IV. Conclusion

Accordingly, the Court finds that the Tax Injunction Act and the underlying principles of comity divest this Court of subject matter jurisdiction.[3]

The Court being fully advised,

IT IS ORDERED granting Defendant's Motion to Dismiss. [Dkt. 3]. All other pending motions are denied as moot. [Dkts. 4, 6, 10 & 23].

DATED this 26th day of February, 2001.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

[3] Because the Court finds that the Tax Injunction Act and the principles of comity prevent this Court from exercising jurisdiction over this action, the Court does not reach Defendant's argument that the Eleventh Amendment applies to the present action.

ARIZONA REVISED STATUTES

A.R.S. § 43-1089

Credit for contributions to school tuition organization; definitions

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization, but not exceeding:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

2. Six hundred twenty-five dollars in any taxable year for a married couple filing a joint return. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

B. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

C. The credit allowed by this section is in lieu of any deduction pursuant to § 170 of the internal revenue code and taken for state tax purposes.

D. The tax credit is not allowed if the taxpayer designates the taxpayer's donation to the school tuition organization for the direct benefit of any dependent of the taxpayer.

E. For purposes of this section:

1. "Handicapped student" means a student who has any of the following conditions:

(a) Hearing impairment.

(b) Visual impairment.

(c) Preschool moderate delay.

(d) Preschool severe delay.

(e) Preschool speech or language delay.

2. "Qualified school" means a nongovernmental primary school, secondary school or a preschool for handicapped students, which is located in this state that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

3. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under § 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

Supreme Court, U.S.
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No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Was the petition for certiorari jurisdictionally out of time?

2. Is district court jurisdiction in this case barred by the Tax Injunction Act or principles of federal-state comity?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Kathleen M. Winn, et al., respectfully request that this Court deny the petition for writ of certiorari. The court of appeals' judgment was entered on October 3, 2002. The petition for writ of certiorari was filed eight months later, on June 3, 2003. No extension of time to petition for certiorari was sought or granted and no timely petition for rehearing or rehearing en banc was filed in the court of appeals'. The petition is therefore jurisdictionally untimely. The decision below is, moreover, clearly correct and consistent with the overwhelming majority of lower-court decisions as well as this Court's decisions. The recent contrary decision of the Fifth Circuit, rendered after the decision below in this case, is an anomaly that does not create a substantial conflict warranting this Court's review.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this case on October 3, 2002. Pet. App. 11. No petition for rehearing or rehearing en banc was filed by petitioner within the 14-day period provided by Rule 40(a)(1) of the Federal Rules of Appellate Procedure,[1] nor did petitioner make a request for an

[1] Petitioner labeled its response to the court of appeals' November 13 request for supplemental briefing (*see* below) regarding the appropriateness of rehearing en banc as a "Petition for Rehearing and Rehearing *En Banc*." That document, however, was filed on December 27, 2002, long after the expiration of the time to petition for rehearing had expired. The court of appeals never responded to this December 27 "petition."

extension of time within which to file a rehearing petition. Petitioner did not move to stay the court of appeals' mandate while petitioner sought certiorari. The court of appeals' mandate was accordingly issued on October 25, 2002, and costs were taxed. No petition for certiorari was filed during the ninety-day period provided for that purpose by 28 U.S.C. § 2101(c) and this Court's Rule 13.

On October 28, 2002, the Clerk of the Ninth Circuit filed the following order: "The mandate issued on October 25, 2002 in the above captioned appeal was in error and is RECALLED." Op. App.[2] 1, *infra*. Thereafter, on November 13, 2002, the court of appeals' panel that had heard and decided the case directed the parties to file briefs "setting forth their respective positions on whether this case should be reheard en banc." Op. App. 2, *infra*. Subsequently, on March 5, 2003, the court filed an order reciting that "[a] judge requested a vote on whether to rehear this matter en banc," that "the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration" and that "[t]he request for rehearing en banc is denied." Pet. App. 1. Judge Kleinfeld, joined by Judge O'Scannlain, dissented from the denial of rehearing en banc. Pet. App. 2-App. 10.

The present petition for writ of certiorari was filed on June 3, 2003, eight months after the court of appeals'

[2] "Op. App." cites are to the Appendix to this Brief in Opposition. On January 17, 2003, petitioner filed a motion for clarification in the court of appeals, asking the court to clarify whether its order recalling the mandate and the court's subsequent order directing the parties to file supplemental briefs suspended the finality of the judgment. The Clerk of Court responded by letter on February 7, 2003, that finality had been suspended.

judgment was entered. Since no timely rehearing petition was filed in the court of appeals, the petition for certiorari was not filed within the time limit prescribed by statute and this Court's rules. 28 U.S.C. § 2101(c) and U.S. Sup.Ct. Rules 13.1, 13.2 and 13.3. The Court consequently lacks jurisdiction.

STATEMENT

1. *The Arizona Tax-Credit Program.* – This case involves an Establishment Clause challenge to an Arizona statute, Ariz. Rev. Stat. § 43-1089[3] that, by means of state income-tax credits, uses state tax revenues to fund religious primary and secondary school education. Under the statute, all individual state taxpayers, whether or not they have children in school, may satisfy part or all of their annual state income-tax liability by transferring up to $500[4] of the amount owed to the state each year for income taxes to a "school tuition organization" (STO), rather than to the state's Department of Revenue. The taxpayer receives a credit against income taxes for the full amount transferred to the STO. The STO must, in turn, use the tax revenues transferred to it to provide scholarships for students attending non-public schools, including religious schools.

Under the Arizona program, STOs need not take financial need into account in awarding scholarships.

[3] The text of § 1089 is set forth in the petition for certiorari at Pet. App. 37-App. 38.

[4] The amount for married taxpayers filing jointly is $625. Ariz. Rev. Stat. § 43-1089(A)(2), Pet. App. 27.

Moreover, each STO may (and almost all do) limit the scholarships they award to students attending schools of a particular religious denomination and/or to students of a particular religious faith. Plaintiffs' complaint alleged, for example, that in the first full year of § 1089's operation, at least 94% of the tax revenues transferred to STOs went to religion-specific STOs – i.e., STOs that restrict their grants to students attending religious schools of a specific religious denomination. Pet. App. 14.

The Arizona program thus differs significantly from the Ohio program recently upheld by this Court in *Zelman v. Simmons-Harris*, 526 U.S. 639 (2002). Unlike the program in *Zelman*, the Arizona program is limited neither to students with financial need nor to students attending substandard schools. In Arizona, by contrast, tax revenues can be and are used to subsidize religious school tuition for students from affluent families and for students who are already attending excellent private schools. Nor (again unlike the situation in *Zelman*) does the Arizona program provide support for academic programs at public as well as private schools; § 1089 permits tax revenues to be diverted only to *non*-public schools. *See* Ariz. Rev. Stat. Ann. § 43-1089(E)(2), at Pet. App. 38.[5] Finally, as noted above, under the Arizona program scholarships may be awarded on a religiously discriminatory basis. STOs need not be open to applications from all eligible students, but may discriminate on the basis of religion, and they ordinarily restrict grants to students who

[5] Arizona does have a program under which a considerably smaller tax credit ($200) is given for payments supporting only *extra-curricular* activities – such as sports teams or class trips – at public schools. Respondents do not challenge that program.

wish to attend schools of a particular religious denomination.[6] Under the *Zelman* program, by contrast, eligible students are considered by the state for vouchers without regard to their religion, without regard to whether the school they wish to attend is religious or non-religious and, if the school is religious, without regard to the religious affiliation of the school.

2. *District Court Proceedings.* – Respondents challenged this program under the Establishment Clause by bringing suit in the United States District Court for the District of Arizona. They sought declaratory and injunctive relief prohibiting the state from using § 43-1089 to divert state income-tax revenues to religious uses. Pet. App. 14. Petitioner moved to dismiss on the basis of the federal Tax Injunction Act, 28 U.S.C. § 1341, which provides that federal district courts shall not "enjoin, suspend or restrain" the "assessment, levy or collection of any tax under state law" when an adequate remedy is available in state courts. The district court granted this motion on the ground that respondents' suit constituted an attempt, barred by the Tax Injunction Act, to restrain the "assessment" of state income taxes in federal court. Alternatively, the court held that principles of federal-state comity prohibited federal district court jurisdiction over any attack on the constitutionality of a state tax law. Pet. App. 17, 23.

[6] In the first year of the Arizona program's operation, more than 46% of the credited funds went to the Catholic Tuition Organization of the Roman Catholic Diocese of Phoenix, which provides scholarships only to students attending schools run by the Diocese. Pet. App. 14. An eligible student may therefore fail to receive a scholarship solely because of his or her religion or because he or she does not want to attend a religious school.

3. *The Decision Below.* – A unanimous panel of the court of appeals reversed and remanded for further consideration of respondents' claim. With regard to application of the Tax Injunction Act, the court of appeals noted that petitioner's invocation of that Act was based entirely on the assertions (1) that plaintiffs' suit sought to enjoin the "assessment" of Arizona income taxes and (2) that "assessment" means "the overall calculus by which the state determines how much revenue it will receive from each taxpayer." Pet. App. 16.

The court of appeals found this reading to be "supported neither by any precedent interpreting 'assessment' in this manner, nor by the meaning of the word [assessment] itself." *Ibid.* More fundamentally, the court observed that, if respondents were to obtain relief from the district court in this case, "there would be no violation of the purposes or policy underlying the Tax Injunction Act." Pet. App. 18. One of these purposes, as shown by the Act's legislative history, was to eliminate the ability of nonresident taxpayers to use the federal diversity jurisdiction to litigate state tax cases in federal rather than state court, so as to avoid state "pay first-litigate later" rules. That purpose was irrelevant to this case. *Ibid.* A second principal purpose was to prevent federal district judges from disrupting a state's collection of tax revenues. The invalidation of a tax credit, however, unlike the invalidation of a tax itself, could not adversely affect or in any way undermine the state's ability to raise revenue. Pet. App. 20. The court therefore found that Arizona's broad argument that the Tax Injunction Act bars "any federal litigation regarding the constitutionality of state taxes" was inconsistent with precedent, the language of the Act, and the expressed congressional purpose. Pet. App. 21.

The court of appeals also rejected the district court's use of the principle of federal-state comity to preclude original federal jurisdiction here. Pet. App. 23-25. The court recognized that this Court has twice used a comity principle to bar district court jurisdiction in cases in which the constitutionality of a state tax law was challenged. Both of these cases,[7] however, were ones "in which the plaintiffs sought to stop the collection of a tax" thus violating an expressed purpose of the Tax Injunction Act. Pet. App. 23. By contrast, the tax provision challenged in the instant case "is a limited, discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes . . . and would, in fact, produce substantial additional revenue for the state." Pet. App. 26. Arizona had thus identified "no harm that renders federal court review of this statute any more intrusive on the state's sovereignty than the review of any other state statute that is alleged to be unconstitutional. Accordingly, comity does not bar plaintiffs' attempt to vindicate the important constitutional rights at issue." *Ibid.*

[7] The cases are *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), and *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100 (1981).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE PETITION FOR CERTIORARI IS JURISDICTIONALLY UNTIMELY

The judgment of the court of appeals that petitioner is asking this Court to review was entered on October 3, 2002. A petition for writ of certiorari seeking review of that judgment was required to be filed within 90 days after the date judgment was entered, unless "a petition for rehearing was timely filed in the lower court by any party," in which case the time to petition would run "from the date of the denial of the petition for rehearing." 28 U.S.C. § 2101(c); Sup.Ct. R. 13.1, 13.3. Neither party petitioned the court of appeals for rehearing or rehearing en banc. The time to petition for certiorari therefore expired in this case on January 2, 2003 (January 1, the ninetieth day, was a holiday). The petition here was not filed, however, until June 3, 2003, more than five months after the time to petition had expired.

Failure to comply with the statutory time limit for filing a certiorari petition in a civil case is a non-waivable jurisdictional defect. *See, e.g.*, Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 348 (8th ed. 2002) ("The time limitations prescribed by Congress, as in 28 U.S.C. § 2101(c) with respect to all civil cases, make the untimely filing of a petition a jurisdictional defect."); *Moore's Federal Practice*, § 513.03[1][a] (3rd ed.) and note ("A petition is considered jurisdictionally out of time . . . if it is filed after the expiration of a time limitation imposed by Act of Congress"; "28 U.S.C. § 2101(c) . . . makes jurisdictional the time to file petition for writ of certiorari in civil case."); Fallon, et al., *Hart & Wechsler's The Federal Courts and the Federal System 1684* (4th ed. 1996) ("the statutory limitations for certiorari and appeal, which are set forth in 28 U.S.C. § 2101(c), are regarded as jurisdictional").

This Court has repeatedly emphasized the non-waivable and jurisdictional nature of the time limit for petitioning for certiorari in civil cases. *See, e.g., Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (stating that an untimely petition in a civil case "must . . . be denied for want of jurisdiction"); *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 91-97 (1994); *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990); Stern, Gressman, et al., *supra*, at 348-349 ("This jurisdictional requirement of timeliness is strictly applied [by this Court] in civil cases. No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained.") (citing *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1974) (declining to entertain a petition when an airline lost the applicant's papers); *Teague v. Commissioner of Customs*, 394 U.S. 977 (1969) (declining to entertain a petition when a snowstorm caused a postal delay). *See also Schacht v. United States*, 398 U.S. 58, 65 (1970) ("In the absence of language providing for waiver, we have without exception treated the statutory limitations as jurisdictional.") (Harlan, J., concurring.) This Court's Rule 13.2 accordingly provides that "The Clerk *will not file* any petition for a writ of certiorari that is jurisdictionally out of time" (emphasis added).

Petitioner appears to have mistakenly based the filing date of his petition on his belief that the petition seeks review of the action taken by the court of appeals on March 5, 2003, when the court denied a circuit judge's *sua sponte* request for rehearing en banc. Thus the first paragraph of the petition states that petitioner "requests that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Ninth Circuit *entered in this case on March 5, 2003*" (emphasis added). That statement is incorrect. The petition here seeks review, not of the court of appeals' March 5, 2003, denial of en banc rehearing, but of the judgment of the court of appeals, which was entered on October 3, 2002, and the time within which a certiorari petition must be filed runs from the date of that judgment. Sup.Ct. R. 13.3.

It is true that this Court's rules provide for extending the time period during which a certiorari petition may be filed "if a petition for rehearing is timely filed in the lower court by any party." *Ibid.* That provision, however, is inapplicable here for at least two reasons. First, no rehearing request was filed here by a party, as Rule 13.3 requires. Neither petitioner nor respondents petitioned for rehearing or rehearing en banc in the court of appeals. The only en banc request in this case was made, *sua sponte,* by a judge of the circuit, presumably one who was not a member of the unanimous panel. The rules and procedures of the Fifth, Sixth, Ninth, Eleventh, District of Columbia and Federal Circuits all expressly provide for or recognize the possibility of such *sua sponte* en banc requests,[8] and Rule 35(a) of the Federal Rules of Appellate Procedure appears to authorize them in all events. By specifying that the time to petition for certiorari is extended beyond the statutory period of ninety days only when a timely rehearing petition is filed in the court of

[8] *See* 5th Cir. R. 35.6; 6th Cir. R. 35(a) and (c); 9th Cir. Gen. Ord. 5.4(c); 11th Cir. R. Rule 35-5; D.C. Cir. Internal Operating Proc. XIII(B)(2); Fed. Cir. R. 35 proc. notes.

appeals "*by any party*," Rule 13 appears expressly to prohibit extensions of the time to petition for certiorari during the pendency of *sua sponte* en banc requests. Rule 13 thus may reflect the fact that, unlike the situation where a party requests rehearing, neither FRAP Rule 35 nor the rules of most circuits stipulate the time period during which a *sua sponte* en banc request must be made, nor do they require that the parties be informed of the pendency of such a request.[9] Extending the ninety-day statutory period for filing a certiorari petition during the pendency of *sua sponte* en banc requests would therefore indefinitely extend the time during which a petition for certiorari might be filed and also extend the period during which the court of appeals' decision would lack finality. In all events, the jurisdictional nature of the ninety-day statutory period for seeking certiorari in civil cases and the completely clear language of Rule 13.3 clearly mean that only rehearing petitions by a *party* can extend the time to petition.

Secondly, even if timely *sua sponte* rehearing requests were to be deemed to extend the time for seeking certiorari, the *sua sponte* request in this case appears not to have been a timely one. The Ninth Circuit's procedures specify that a *sua sponte* en banc request must be made "within seven days of the expiration of the time for filing a petition for panel rehearing." As the rules go on to explain, "[t]his means the *sua sponte* call must be made within 21

[9] A time limit for *sua sponte* en banc requests seems to be present only in the Ninth Circuit. Furthermore, only the Ninth Circuit requires that the parties be informed of a *sua sponte* call for rehearing en banc. 9th Cir. Gen. Ord. 5.4(c)(3).

days of the filing of the panel's decision . . . . " 9th Cir. Gen. Ord. 5.4(c)(3). Although the circuit's rules further provide that, by making a "stop clock" request, a judge "may extend the time in which to make an en banc call for 14 days," "[o]nly one such delay is permitted." In addition, a judge making a "stop clock" call must "direct the Clerk of Court or any person the Clerk may designate to stay the mandate and notify the panel. . . . Otherwise the mandate will issue pursuant to F.R.A.P. 41(a) and en banc procedures will terminate." 9th Cir. Gen. Ord. 5.4d.

The court of appeals' mandate in this case was issued on October 25, 2002, one day after the deadline imposed by Rule 41(b) of the Federal Rules of Appellate Procedure. The issuance of the mandate strongly indicates that no timely "stop clock" call was made since, if such a call was made, the Clerk would not have issued the mandate. The Clerk's order of October 28, 2002, recalling the mandate does not explain the reasons for the recall, except to state that the issuance of the mandate was "in error." Op. App. 1. Although courts of appeals have inherent power to recall their mandates, that power can be exercised "only in extraordinary circumstances" involving "grave, unforeseen contingencies." *Calderon v. Thompson,* 523 U.S. 538, 550 (1998), reversing 151 F.3d 918 (9th Cir. 1997). No such contingencies were present in this case. It is likely, therefore, that en banc procedures terminated in the Ninth Circuit on October 25, 2002. Moreover, even if a timely "stop clock" call was made and the mandate was properly recalled, the time in which a timely *sua sponte* en banc request could be made would have been extended only until November 7, 2002. The court's supplemental briefing order, however, which the Ninth Circuit requires to be entered "upon receipt" of a *sua sponte* en banc request, 9th

Cir. Gen. Ord. 5.4(c)(3), was not entered until November 13, 2002, almost a week after the latest possible date on which a timely *sua sponte* call could have been made.

These confusing and unexplained delays, in the one circuit that has adopted time limits and notification requirements for *sua sponte* en banc requests, reinforce the need to respect the clear language and the jurisdictional character of 28 U.S.C. § 2101(c) and Supreme Court Rule 13. Pursuant to these provisions, the petition for certiorari in this case was untimely and the Court has no jurisdiction.

II. THE DECISION BELOW WAS CLEARLY CORRECT

The court of appeals' decision that the Tax Injunction Act is not applicable to this case was clearly correct. The Act does not bar district court jurisdiction over all constitutional challenges to any aspect of state tax legislation, as petitioner contends, but only over cases in which the district court is asked to restrain the "*assessment, levy or collection*" of state taxes. By seeking to invalidate, not a tax, but an unconstitutional credit against income taxes due, plaintiffs' suit would do none of these things.

Contrary to petitioner's argument, the removal of the STO credit from the credits that may be subtracted on a taxpayer's return from the balance of taxes owed to Arizona will have no effect whatsoever on Arizona's ability to "assess" taxes. Removing the STO credit will not change Arizona's definition of gross taxable income. It will not change the amount or character of the deductions from gross income that may be made in computing taxable income. It will not change the tax rates applicable to that

taxable income, or the methods for calculating the taxes that are due. Nor will plaintiff's suit result in any interference with Arizona's ability to "levy" or to "collect" any tax. To the contrary, if respondents are successful Arizona's future state income tax revenues will be significantly increased by the cancellation of an unconstitutional credit against income taxes due.

Respondents' complaint asks the district court (i) to declare the STO tax-credit provision unconstitutional, (ii) to enjoin defendant from permitting taxpayers to claim the credit in the future, and (iii) to order the defendant to inform STOs that they must return tax revenues in their possession (i.e., amounts they have not yet awarded as scholarships) to the state general fund. This relief would in no way interfere with Arizona's ability to assess, levy or collect its income tax. Defendant would simply need to remove the STO credit from the list of credits that taxpayers may claim on their state income-tax returns in future years and inform STOs of their obligation to return tax funds in their possession to the state. The result of the defendant's compliance with such an order would be to increase both state income-tax revenues and the amount in the state general fund. No delay or other interference with tax assessment or collection would occur. The Tax Injunction Act is inapplicable in such a situation.

This Court recently unanimously explained, in an opinion by Justice Ginsburg, that a suit to collect a state tax from federal judges, challenged as a violation of the Constitution's intergovernmental tax immunity doctrine, is not barred by the Tax Injunction Act because it does not seek "to stop . . . the collection of taxes." *Jefferson County v. Acker*, 527 U.S. 423, 433, 435 (1999). As the Eighth Circuit has held, the same is true of a suit seeking a

district court order raising state property and income taxes as part of a desegregation remedy because the Tax Injunction Act is "inapplicable to efforts to require collection of additional taxes as opposed to efforts to inhibit the collection of taxes." *In re Jackson County*, 834 F.2d 150 (8th Cir. 1987). Numerous other district and circuit court cases have reached the same conclusion. *See, e.g.*, *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996) (suit challenging the exemption of religious organizations from state unemployment tax is not barred by the Tax Injunction Act); *Moton v. Lambert*, 508 F. Supp. 367, 368 (N.D. Miss. 1981) (Tax Injunction Act is inapplicable to a suit challenging a state property-tax exemption for racially discriminating private schools); *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir. 1980) (Tax Injunction Act is inapplicable to a suit seeking a declaration that a power plant is subject to state tax); *Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969) (suit to "order the collection and disbursement of certain county tax monies" is not barred by the Tax Injunction Act). It is only in cases where the federal remedy threatens actually to interfere with a state's ability to obtain tax revenue that the Act's prohibition applies. In other cases, Congress has given plaintiffs the right to choose a federal forum for litigation of their federal constitutional claims.[10]

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[10] *See, e.g.*, 42 U.S.C. § 1983. Scholarly commentary is in complete agreement with the Ninth Circuit's reading of the Tax Injunction Act. *See, e.g., Moore's Federal Practice* (3d ed.) 57.25[2][b] ("A suit *to collect* tax is not one brought to restrain state action; therefore, it is not within the Act's description of suits that are barred from adjudication by federal courts"); *Id.*, § 121.41[1] (The Act "seeks to avoid interference by federal courts that would 'threaten the flow of general revenue to or the

(Continued on following page)

In asking this Court to review the decision below, the petitioner and amici focus their attention on the meaning of the word "assessment" in the Act, as did Judge Kleinfeld in his dissent from the circuit's decision not to rehear the case en banc. Although they recognize that dictionaries contain a number of definitions of the term, they contend that "assessment" should be defined broadly to encompass everything having to do with state taxation. Proper statutory construction, however, requires that unclear words in a statute be construed to accomplish legislative intent. The Tax Injunction Act was expressly designed by Congress to prevent taxpayers who challenge the validity of state taxes from using federal courts to obtain injunctive relief that would withhold tax revenues from states and their subdivisions so "as to seriously disrupt state and county finances." S.Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937). The application of the term "assessment" by the court of appeals in this case is completely consistent with that intent.

Significantly, in interpreting the term "assessment," neither petitioner nor his amici refer to the intent of Congress in adopting the Tax Injunction Act. Nor do they advert to two of the fundamental rules of statutory construction – *noscitur a sociis* and *ejusdem generis*. Under the former doctrine, when general words are used in association with more specific words, the general words

budgets of state governments.' "); Wright, et al., *Federal Practice and Procedure* § 4237 (2nd ed. 2001); Fallon, et al., *Hart & Wechsler's The Federal Courts and the Federal System* (4th ed. 1996) p. 1216 ("Congress was ... concerned that taxpayers, with the aid of a federal injunction, could withhold large sums, thereby disrupting governmental finances.").

take on the restricted meaning analogous to the more specific words. As the Court said in *Jarecki v. G.D. Searle & Co.*: "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings *in order to avoid the giving of unintended breadth to the Acts of Congress*." 367 U.S. 303, 307 (1961) (emphasis supplied). Similarly, under the principle of *ejusdem generis*, specific terms in a statute govern general terms. *U.S. v. Parker*, 30 F.3d 542 (4th Cir. 1994), *cert. denied*, 513 U.S. 1029 (1994).[11] Thus, when the Tax Injunction Act bars federal suits to enjoin the "assessment, levy or collection" of any state tax, the term "assessment" is to be given a meaning that relates to the "levy" and "collection" of taxes. To interpret "assessment" as encompassing the entire tax structure of the state, as petitioner and amici would do, is inconsistent both with the expressed intent of the Act and with these basic principles of statutory construction.

The court of appeals was also clearly correct in rejecting the argument that principles of comity foreclose district court jurisdiction here. As the decision below explained, Pet. App. 23, the applicable comity principle, like the Tax Injunction Act, bars federal jurisdiction only where the relief sought would constitute actual interference with a state's collection of revenue. Both Supreme Court cases in which comity has been invoked to bar federal jurisdiction over challenges to state taxes were

[11] These two axioms of judicial construction are often considered together as corollaries. *See, e.g., Cortez v. University Mall Shopping Center*, 941 F. Supp. 1096 (D. Utah 1996).

thus cases in which plaintiffs "sought to stop the collection of a tax." *Ibid. See Great Lakes Dredge & Dock Co. v. Hoffman*, 319 U.S. 293 (1943); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981).

Since the first of these cases was decided, this Court has twice entertained important Establishment Clause challenges to state tax credits or deductions in cases that originated in federal district courts. *See Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Mueller v. Allen*, 463 U.S. 378 (1983). *See also Griffin v. Prince Edward County*, 377 U.S. 218 (1964), affirming a federal district court's injunction against a county's allowance of tax credits for taxpayer contributions to racially segregated private schools. A unanimous Court in *Griffin* had "no doubt of the power of the court to give this relief. . . . It has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights. . . . The injunction against . . . giving tax credits . . . is appropriate . . . " 377 U.S. at 232-233. No member of the Court mentioned either the Tax Injunction Act or comity as a jurisdictional barrier to relief striking down the unconstitutional tax credit.

Nyquist and *Mueller* are this Court's two cases most closely related to the Establishment Clause issues raised in the present case. *Nyquist* struck down a New York income-tax credit for private and religious school expenses; *Mueller* upheld a Minnesota income-tax deduction for religious school expenses. Both of these cases were initiated in federal district courts. *See Committee For Public Education v. Nyquist*, 350 F. Supp. 655 (S.D.N.Y. 1972); *Mueller v. Allen*, 514 F. Supp. 998 (D. Minn. 1981). *Nyquist* came directly to this Court from a three-judge district court; *Mueller* was reviewed in the court of appeals

before coming here. *Mueller v. Allen*, 676 F.2d 1195 (8th Cir. 1982). If petitioner and amici are correct that the Tax Injunction Act and principles of comity bar federal district court jurisdiction in this case, jurisdiction would also have been precluded in *Nyquist* and *Mueller*. Yet none of the many opinions in either of these thoroughly well-litigated cases suggests the relevance of the Tax Injunction Act or comity principles. This omission is especially striking with regard to *Mueller*, in which the opinion of the Court was written by then-Justice Rehnquist who, less than two years earlier, had written the Court's important opinion in *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100 (1981). The *McNary* opinion fully explored the history and scope of the Tax Injunction Act and applied comity principles to preclude district court jurisdiction in a case threatening direct interference with state tax collection. If either the Act or principles of comity precluded a federal district court suit challenging an unconstitutional tax credit or deduction, there seems little doubt that the Court would have noticed that serious jurisdictional defect in *Mueller*.

III. THERE IS NO SIGNIFICANT CONFLICT IN THE CIRCUITS; THE RECENT DECISION OF THE FIFTH CIRCUIT IS AN ANOMALY

Like the court below, other federal courts of appeals have, with the single exception of a Fifth Circuit panel decision rendered after the decision below in this case, consistently construed the Tax Injunction Act as applicable only where the remedy sought would threaten some actual interference with a state's ability to collect tax revenue. The basic distinction between suits that seek to prevent tax collection, to which the Act applies, and suits seeking remedies that do not interfere with tax collection, to which

the Act does not apply, has been consistently recognized in the courts of appeals.

Thus in *Dunn v. Carey*, the Seventh Circuit, in an opinion by Judge Easterbrook, held that "[t]he Tax Injunction Act applies *only to requests that federal courts interfere with the collection of state taxes*." 808 F.2d 555, 557 (7th Cir. 1986) (emphasis added). The Seventh Circuit specifically rejected the contention (identical to the argument that petitioner makes here) that the Act "applies to any federal litigation touching on the subject of state taxes." Judge Easterbrook explained that "neither the language nor the legislative history of the statute supports this interpretation. The text of 28 U.S.C. § 1341 does not suggest that federal courts should tread lightly in issuing orders that might allow governments to raise additional taxes." 808 F.2d at 558.

The Fifth Circuit, prior to its recent panel decision, had adopted the same reading, concluding that, "under Fifth Circuit precedents, § 1341 is inapplicable to the present case *because it seeks not to inhibit the collection of taxes, but to require the collection of additional taxes.*" *Appling County*, 621 F.2d at 1303-04 (emphasis added). The Second, Third, Fourth, and Tenth Circuits have all reached the same conclusion. *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975) (Friendly, J.) ("In speaking of 'collection' [in the Tax Injunction Act], Congress was referring to methods similar to assessment and levy, e.g., distress or execution ... that would produce money or other property directly [to the State]."); *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1191 (10th Cir. 1998) (Tax Injunction Act applies to claims for "injunctive relief against state or local taxes"); *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 403 (3rd Cir. 1982) ("The policy of non-interference with state

revenue collection served by the Tax Injunction Act applies fully to attempts to enjoin withholding, which often comprises an essential administrative mechanism for the orderly collection of taxes."); *Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 301 (4th Cir. 2000) (Tax Injunction Act reflects "Congress's desire to keep federal courts from *unduly interfering with state revenue collection*") (emphasis added); *In re Jackson County*, 834 F.2d 150, 151 (8th Cir. 1987), the Tax Injunction Act "has been held to be *inapplicable to efforts to require collection of additional taxes*, as opposed to efforts to inhibit the collection of taxes" (emphasis added).

Petitioner cites three cases as support for the contention that a conflict in the circuits exists: *United States Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979); *In re Gillis*, 83 F.2d 1001 (6th Cir. 1988); and *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237 (11th Cir. 1982). *Perez* was decided, not under the Tax Injunction Act, but under a jurisdictional statute applicable only to the Commonwealth of Puerto Rico. The case involved a challenge to a tax increase on beer that exempted local beer producers. The court observed that the plaintiffs' request for relief "could be formed in two ways, either by ordering the state not to collect the tax increase or by requiring the state to levy the tax hike on exempt as well as nonexempt parties." The court noted that the first (and most probable) form of relief would directly restrain the collection of tax, while the second would result in the district court's creation of a "broad taxing statute for which the Commonwealth may have believed there was no need or which was actually detrimental to its domestic policy."

The situation in the present case is wholly dissimilar. The relief respondents seek cannot possibly restrain the

collection of state taxes, would not impose any new tax on any Arizona citizen, and would work no basic change in Arizona income-tax policy. Similarly, in *Colonial Pipeline Co.*, the Eleventh Circuit applied the Tax Injunction Act because the requested relief, if granted, "would require a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system." Nothing remotely comparable is present here.

In *Gillis,* the Sixth Circuit did not base its decision on the Tax Injunction Act. It applied comity principles to preclude federal jurisdiction in a case that challenged the entire ad valorem tax system of the state of Kentucky. The court of appeals observed that, if the plaintiffs prevailed, there "the district court would be forced to issue a declaratory judgment finding that virtually all property owners in the state of Kentucky had been deprived of their right to equal protection under the United States Constitution by the manner in which petitioners administered the state tax system." 836 F.2d at 1008. Plaintiff's requested injunctive relief would have required petitioners "to reassess all real and personal property owned by coal, oil and gas interests." *Id.* at 1009. The *Gillis* court concluded that, in these circumstances, "the interference by the federal courts into the state tax system is the *same in degree and kind as a suit seeking to enjoin a state tax.*" *Id.* at 1008 (emphasis added).

Gillis thus explicitly relied on the presence of the same revenue-destructive factors that this Court has recognized as the basis for applying comity principles to preclude district court jurisdiction. These revenue-destructive factors are obviously not present here. *Gillis,* like *Perez* and *Colonial Pipeline*, is completely consistent with the court of appeals' decision in the present case –

federal district court jurisdiction is precluded only where the relief requested would interfere with the state's ability to collect tax revenues.

In a supplemental filing, petitioner has informed the Court of the June 11, 2003 Fifth Circuit opinion in *American Civil Liberties Union v. Bridges,* No. 02-30493, 2003 WL 21362357 (5th Cir. 2003). In that case, decided after the petition for certiorari here was filed, Louisiana had created exemptions in several state tax statutes for religious activities. These exemptions were challenged as violations of the Establishment Clause. The district court, following established precedent, found that the Tax Injunction Act did not apply because plaintiff was not seeking to restrain the "assessment, levy or collection" of state taxes but to eliminate unconstitutional tax exemptions. The Fifth Circuit reversed, broadly stating that the Tax Injunction Act prevents a district court from hearing a suit "seeking to prevent the state from carrying out the current tax system by having a portion of that tax system declared unconstitutional." 2003 WL 21362357 at p. 5.

While the Fifth Circuit saw its decision as inconsistent with the Ninth Circuit's decision in the present case, there are at least two important factual differences. First, the Fifth Circuit in *Bridges* recognized that the district court's decision there could, in practical effect, result in loss of tax revenue to the state: "[I]t is not necessarily true that declaring the [Louisiana] exemptions to be unconstitutional will result in the State collecting more taxes. . . . In fact even as the ACLU argues, just the opposite could occur, the State may resolve any putative constitutional problems created by the challenged statutes by exempting more entities and therefore collecting less taxes." *Ibid.*

This potential for loss of state revenue as a result of federal district court action is not present here.

A second distinction between *ACLU v. Bridges* and the present case is the difference between tax exemptions and tax credits. Exemptions are part of the process of establishing the amount of the taxpayer's tax obligation; credits are a means of satisfying that obligation once it is established. It is possible, therefore, to characterize a challenge to an exemption as a challenge to the process of "assessing" the amount of income tax that is due to the state. Even under such a broad definition of "assessment," however, the application of a credit toward satisfaction of the tax obligation would not be part of the tax "assessment" process.

While the Fifth Circuit's language may be inconsistent with the decision below in this case, its holding thus may not create a conflict. In all events, one recent opinion of one circuit that is out of step with the decisions of all other circuits to have considered the question, as well as with the opinions and decisions of this Court, does not call for review of the decision below in this case. The decision below is consistent with decisions in every other circuit and with this Court's actions in *Griffin, Nyquist* and *Mueller*. It is a clearly correct application of the Tax Injunction Act and prevailing comity principles.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M WINN, an Arizona taxpayer, et al., Plaintiffs-Appellants, v. MARK W KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant-Appellee.	No. 01-15901 D.C. No. CV-00-00287-EHC District of Arizona, Phoenix ORDER (Filed Oct. 28, 2002)

The mandate issued on October 25, 2002 in the above captioned appeal was in error and is RECALLED.

FOR THE COURT:

Cathy A. Catterson
Clerk of Court

/s/ Pinky Argonza

By: Pinky Argonza
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MARUICE [sic] WOLFTHAL, an Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer,

Plaintiffs-Appellants,

v.

MARK W KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,

Defendant-Appellee.

No. 01-15901
D.C. No. CV-00-00287-EHC
ORDER
(Filed Nov. 13, 2002)

Before: SCHROEDER, Chief Judge, D.W. NELSON and REINHARDT, Circuit Judges

The parties are directed to file simultaneous briefs setting forth their respective positions on whether this case should be reheard en banc. The briefs shall not exceed fifteen (15) pages and shall be filed within twenty-one (21) days from the filed date of this order. Fifty (50) copies should be filed.

Supreme Court, U.S.
FILED
SEP 2 2003
OFFICE OF THE CLERK

No. 02-1809

(5)

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer;
DIANE WOLFTHAL, Arizona taxpayer;
MAURICE WOLFTHAL, Arizona taxpayer;
LYNN HOFFMAN, Arizona taxpayer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Unable to hide the split in the circuits concerning the scope of the Tax Injunction Act, Respondents belatedly attempt to persuade the Court that it lacks jurisdiction to hear the Petition. The Court has jurisdiction over the Petition because the Court of Appeals for the Ninth Circuit suspended the finality of the judgment while it considered whether to rehear this case en banc and Petitioner timely filed the Petition within ninety days of the Court's denial of the rehearing request.

Respondents also misleadingly attempt to minimize the circuit conflict. There is a conflict among the circuits regarding the scope of the Tax Injunction Act and principles of comity that preclude federal court interference with state tax systems. The First, Fifth, Sixth, and Eleventh Circuits have recognized that either the Tax Injunction Act or the principles of comity preclude federal court interference with state tax systems. The Ninth Circuit's opinion in this case, which holds that the Tax Injunction Act does not preclude a challenge to Arizona's tax credit for donations to a school tuition organization (STO),[1] plainly conflicts with the decisions of these circuit courts.

Finally, Respondents erroneously argue that the term "assessment" in the Tax Injunction Act is synonymous with

---

[1] Respondents' argument that Arizona's tax credit for donations to an STO is different from the voucher program that the Court recently upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is irrelevant to the issue presented in the Petition. The argument is also incorrect. In *Zelman*, this Court held Ohio's school voucher program did not violate the Establishment Clause because the program was neutral with respect to religion and provided "assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652. Like Ohio's voucher program, Arizona's STO credit is neutral with respect to religion and provides a tax credit to a broad class of citizens who, as a result of their own genuine and independent private choice, donate money to organizations that provide scholarships to students attending religious schools.

the term "collection" in that Act. Respondents' argument is contrary to the plain meaning of "assessment," well established rules of statutory construction, and this Court's decisions recognizing the importance of the principles of comity that require federal courts to refrain from interfering with the administration of state taxes.

This Court should grant the Petition to resolve the conflict in the circuits concerning the scope of the Tax Injunction Act.

REASONS FOR GRANTING PETITION

I. The Petitioner Filed the Petition for Certiorari Within the Jurisdictional Time Limit.

Respondents argue that the Petition is untimely because the Petitioner did not file it within ninety days after the court of appeals entered judgment on October 3, 2002. Respondents' argument fails because the court of appeals suspended the finality of the October 3, 2002 judgment while it considered whether to rehear the matter en banc and Petitioner filed the Petition within ninety days of the Court's decision denying the request for rehearing en banc.

This Court has consistently treated timely filed petitions for rehearing "as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). This is because "[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified to alter its adjudication of the rights of the parties." *Id.* at 46 (quoting *Dep't of Banking v. Pink*, 317 U.S. 264, 266 (1942)). "[W]hile the petition for rehearing is pending, there is no 'judgment' to be reviewed." *Id.*

The Ninth Circuit General Orders allow any judge to suspend the finality of a judgment by sua sponte calling for a vote on rehearing en banc. Pursuant to General Order 5.4(c)(3), any judge may sua sponte call for a vote on rehearing en banc within seven days of the expiration of the time for filing a petition for panel rehearing. After receiving a

timely sua sponte en banc call, the author of the panel opinion ordinarily enters an order directing the parties to file simultaneous briefs within twenty-one days setting forth their respective positions on whether the court should rehear the matter en banc. *Id.* Under General Order 5.4(d), if a judge makes a sua sponte call in a case in which no petition for rehearing has been filed, the judge shall direct the clerk of the court to stay the mandate and notify the panel.

In this case, the Ninth Circuit suspended the finality of the October 3, 2002 judgment. After the panel issued its decision on October 3, 2002, neither party filed a motion for rehearing. A judge in the Ninth Circuit requested a vote on whether to rehear the matter en banc. Pet. App. 1. Although the court issued its mandate on October 25, 2002, it recalled the mandate on October 28, 2002,[2] and, on November 13, 2002, directed the parties to file simultaneous briefs concerning whether the Ninth Circuit should hear this case en banc. Respondents' Brief in Opposition (Op.) App. 1, 2. In response to the court's order, Petitioner urged the court to rehear the case en banc and Respondents objected to such a rehearing. On March 5, 2003, the court issued its order denying "[t]he request for rehearing en banc." Pet. App. 1. Petitioner timely filed the Petition for Certiorari on June 3, 2003.

Respondents argue that the Petition was not timely filed under Supreme Court Rule 13.1 because neither party filed a timely request for rehearing. But Petitioner *did* file a timely request for rehearing en banc after the court asked for briefing on that issue. Respondents cite no authority to support their argument that Rule 13.3 will only toll the time for filing a petition for certiorari if it is filed by a party on its own initiative instead of in response to a court order.

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[2] The Ninth Circuit did not abuse its discretion in recalling the mandate to correct a clerical or administrative error. *See Lamb v. Farmers Ins. Co.*, 586 F.2d 96, 97 (8th Cir. 1978); 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3938 at 720 (2d ed. 1996) (recognizing that the court has the authority to correct missteps by the court or parties by recalling the mandate).

And, Respondents' argument is contrary to the rationale of this Court's decisions and the principle of judicial economy. *See Jenkins*, 495 U.S. at 46 ("while the petition for rehearing is pending, there is no 'judgment' to be reviewed"); *Bowman v. Loperena*, 311 U.S. 262, 266 (1940) (when an untimely petition for rehearing is filed and "the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof"). Indeed, the court specifically assured Petitioner that it had suspended the finality of the judgment here by ordering the parties to brief the rehearing issue and recalling the prematurely issued mandate. Reply App. 1. To require Petitioner to file a petition for certiorari while the court of appeals is considering whether to rehear the matter en banc would waste both judicial and the parties' resources.

The Court must also reject Respondents' argument that the sua sponte call for a rehearing en banc vote appears to have been untimely. Respondents acknowledge that the parties do not know if the sua sponte call was within the twenty-one days required by the Ninth Circuit's General Order 5.4(c)(3). Op. at 11-12. Moreover, General Order 5.1(b)(2) gives the en banc coordinator the authority to extend, suspend, or compress the time schedules in the En Banc Procedures Chapter for good cause. Because the Ninth Circuit assured Petitioner that it had suspended the finality of the judgment, Reply App. 1, it is apparently satisfied that it has complied with its General Orders. This Court need not inquire further. The Court has jurisdiction over the Petition because Petitioner filed it within ninety days of the Ninth Circuit's denial of the rehearing request.

II. The Respondents Fail to Diminish the Conflict that Exists Between the Ninth Circuit's Decision and Decisions of the First, Fifth, Sixth, and Eleventh Circuits.

The Respondents attempt to diminish the conflict between the decision below and the decisions of the First, Fifth, Sixth, and Eleventh Circuits, by misconstruing the

holdings in those cases and ignoring key similarities. The Respondents also misconstrue decisions in other circuits in a failed attempt to establish that these decisions support the Ninth Circuit's opinion in this case.

Initially, the Respondents concede that the Ninth Circuit's decision is "out of step" with *American Civil Liberties Union Foundation v. Bridges*, 334 F.3d 416 (5th Cir. 2003), *reh'g and reh'g en banc denied*, No. 02-30493 (5th Cir. July 29, 2003). Op. at 24. Although the Respondents acknowledge that the Fifth Circuit expressly recognized that its decision conflicted with the Ninth Circuit's decision below, they nevertheless argue that the Fifth Circuit's decision is an "anomaly," and the court got it wrong because of two "important factual differences." Op. at 19, 23. These "differences," however, in no way diminish the conflict that now exists between the two circuits. First, Respondents note that *Bridges* recognized that declaring Louisiana's tax exemptions to be unconstitutional may not result in the State collecting more taxes because the State may simply exempt more entities in response to any court decision striking the exemptions down. *Id.* Surprisingly, the Respondents then argue that the same potential loss as a result of the federal district court action below is not present here. *Id.* Under the reasoning in *Bridges*, however, the same potential loss certainly exists in Arizona because the Arizona Legislature may choose to enact other credits in response to invalidation of the STO credit. Second, the Respondents argue that the cases are distinguishable because *Bridges* dealt with tax exemptions instead of tax credits. There is no analytical difference between the two. Both accomplish the same objective, which is relief from state taxation, and both affect the final assessment of an individual's tax liability. *Cf. Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting) ("Our opinions have long recognized – in First Amendment contexts as elsewhere – the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system' . . .") (internal citation omitted).

Contrary to Respondents' contention, *Bridges* is not an anomaly. It is consistent with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), which Respondents fail to distinguish adequately. The *Gillis* court specifically rejected the argument that comity should not be invoked if an action may result in an order to state tax officials that could increase taxes. The Respondents argue that *Gillis* is limited only to situations in which the interference with a state tax system would be the same in degree and kind as those seeking to destroy a State's ability to raise revenue. Op. at 22. The court, however, viewed the principle of comity much more broadly and even noted that the very existence of a suit unduly intrudes on administration of a State's tax system. *Id.* at 1009. The Fifth Circuit expressly acknowledged that its holding in *Bridges* was consistent with *In re Gillis* and inconsistent with the decision below. *Bridges*, 334 F.3d at 422.

United States Brewers Association, Inc. v. Perez, 592 F.2d 1212 (1st Cir. 1979), and *Colonial Pipeline Company v. Collins*, 921 F.2d 1237 (11th Cir. 1991) are also consistent with *Bridges*. In *Perez*, 592 F.2d at 1215, the First Circuit found that a federal anti-tax injunction statute applicable to Puerto Rico, which contains essentially the same language as the Tax Injunction Act, prohibits relief that requests an order that some taxpayers be taxed more. Although that case did not involve a tax credit, the result would have been to increase tax revenue. There is no meaningful distinction between *Perez* and what Respondents seek to do here. The Respondents argue that the Eleventh Circuit dismissed *Collins* under the Tax Injunction Act only because it concluded that the suit would have required a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system. Op. at 22. This argument, however, oversimplifies the court's holding and ignores its rationale. The Eleventh Circuit characterized the argument that the Tax Injunction Act does not apply when the requested relief would enlarge tax revenues as "overly literal and technical," 921 F.3d at 1242, thus rejecting the Ninth Circuit's rationale. The court further found such intervention would "clearly conflict with the principle underlying the Tax Injunction Act that the

federal courts should generally avoid interfering with the sensitive and peculiarly local concerns surrounding state taxation schemes." *Id.*

Furthermore, the Respondents overstate the extent to which other circuit courts agree with the Ninth Circuit's ruling below. In any event, the courts' differing rationale in these cases illustrates that this Court should resolve the conflict.

The language that Respondents quote from *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986), Op. at 20, may be disregarded as dicta. As the court notes, the "district judge was not requested in this case to interfere with the collection of a tax; he was asked to interfere with the conduct of litigation." *Id.* at 557. The issue was not the validity of the state tax, but the authority of the federal court to enjoin a state court challenge to a state tax. Moreover, as the court noted in *Bridges*, *Dunn* is inapplicable because it only supports the proposition that taxpayers can use the federal courts to assert a claim for the collection of taxes imposed by a federal consent decree and the Tax Injunction Act does not prevent jurisdiction over such a suit. 334 F.3d at 416. Here, however, like *Bridges*, the district court was being asked to decide how state taxes should be calculated and assessed. *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir. 1980), also involved a state seeking to collect a tax from a group of taxpayers and not to have a state tax declared unconstitutional. The Fifth Circuit easily distinguished this case in *Bridges*. 334 F.3d at 421.

Wells v. Malloy, 510 F.2d 74 (2nd Cir. 1975), challenged Vermont's statute that revoked a person's right to operate a motor vehicle if the person was in default of an obligation to pay the state tax on motor vehicle purchase and use. The action was not a challenge to the tax itself and the court only addressed the issue of "collection." In *Sipe v. Amerada Hess Corporation*, 689 F.2d 396, 403 (3rd Cir. 1982), another case cited by Respondents, the Third Circuit questioned whether *Wells* survives the reasoning in more recent decisions of this Court.

In re Jackson County, 834 F.2d 150 (8th Cir. 1987), fails to analyze the Tax Injunction Act issue other than to cite *Appling County*. In any event, *Jackson County* did not involve a challenge by a taxpayer to a state tax, but the authority of a federal judge to order the imposition of a tax to fund a school desegregation order.

In sum, the circuit courts are in conflict over how to interpret the Tax Injunction Act and the principles of comity. This Court should grant certiorari to resolve the conflict by clarifying that the Tax Injunction Act and the fundamental principle of comity between federal courts and state governments in the area of state taxation require the dismissal of Respondents' lawsuit challenging Arizona's tax credits.

III. The Tax Injunction Act and the Principles of Comity Prohibit Federal District Court Interference with the Administration of a State's Tax System.

Respondents essentially argue that the common definition of the term "assessment" is not the one Congress intended because it only intended to prohibit interference with the collection of state taxes. Op. at 14. This argument ignores the plain meaning of the term "assessment," the rules of statutory construction, and this Court's understanding of the broad scope of the Tax Injunction Act. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981) ("The Tax Injunction Act generally prohibits federal district courts from enjoining state tax administration except in instances where the state court remedy is not plain, speedy and efficient.")

Respondents cite to decisions that hold that the Tax Injunction Act does not prohibit suits to collect a tax. Op. at 14-15. But Respondents' lawsuit does not request the district court to authorize the collection of taxes; it requests the court to invalidate a tax credit. Therefore, these decisions do not support their argument.

The Respondents then essentially argue that the term "assessment" is nothing more than another way of saying

collection. The Tax Injunction Act prohibits suits in federal district court that "enjoin, suspend, or restrain the *assessment*, levy *or* collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341 (emphasis added). Because Congress used both the term "assessment" and "collection," it intended each term to have a different meaning. *See Sec. & Exch. Comm'n v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Respondents argue that two rules of statutory construction – *noscitur a sociis* and *ejusdem generis* – establish that Congress did not intend for the term "assessment" to be given its plain meaning, but intended "assessment" to be given a meaning that relates to the "levy" and "collection" of taxes. Op. at 16-17. To the contrary, the rule *noscitur a sociis* establishes that the term "assessment" in the Tax Injunction Act must mean something different than the terms "collection" and "levy." The maxim *noscitur a sociis* defines a term based on the words around it and applies where a word is capable of many meanings. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). This is not an "inescapable rule," however, and "[t]he statute admits a reasonable construction which gives effect to all of its provisions." *Id.* at 307-08. This Court noted that "[i]n these circumstances [it] will not adopt a strained reading which renders one part a mere redundancy." *Id.* Respondents' argument that the term "assessment," means nothing more than "collection" would create a redundancy not intended by Congress. The principle of *ejusdem generis* provides that a general statutory term should be construed in light of the specific terms that precede it. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (quoting 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). The principle of *ejusdem generis* is not helpful in interpreting the Act because it does not contain a "general term" such as "other tax procedure," that follows the

specific terms "levy," "collection," and "assessment." Each one of these words has its own distinct meaning in the tax context and must be interpreted accordingly.

Finally, Respondents erroneously argue that the Court's consideration of Establishment Clause challenges to state tax credits or deductions establishes that the district court had jurisdiction in this case. Op. at 18-19 (citing *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and *Mueller v. Allen*, 463 U.S. 378 (1983)). It is well established that the exercise of jurisdiction in a case is not precedent for the existence of jurisdiction where it is not raised by the parties or discussed by the court. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Because the Tax Injunction Act was not raised or discussed in *Nyquist* or *Mueller*, those cases do not support Respondents' argument that their lawsuit is not prohibited by the Tax Injunction Act.

As the Court has noted, the Tax Injunction Act and the Court's decisions that preceded its enactment "reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism.'" *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 103 (1981). Although Congress was concerned about federal judicial decisions that would directly interfere with the collection of state taxes, it was also concerned about the principles of comity that preclude interference with state tax systems. Congress therefore did not limit the language of the Tax Injunction Act to only prevent interference with the "collection" of state taxes but also the interference with the "assessment" of state taxes. Because Respondents' lawsuit interferes with the assessment of Arizona taxes, it is precluded by the Tax Injunction Act. It is also precluded by the principles of comity.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX I

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February 7, 2003

Ms. Paula S. Bickett
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Re: *Winn v. Hibbs, No. 01-15901*

Dear Ms. Bickett:

The panel has asked me to respond to your motion for clarification and to reassure that the orders recalling the prematurely issued mandate and directing the parties to file simultaneous briefs has suspended the finality of the judgment.

If you have any further questions, I can be reached at (415) 556-9811.

Sincerely,

//s// Cathy A. Catterson

Cathy A. Catterson
Court Executive/Clerk of Court

cc: All Counsel

(3)

Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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3 pp

Pursuant to Supreme Court Rule 15.8, Petitioner J. Elliott Hibbs respectfully submits this supplemental brief to bring to the Court's attention a new decision of the United States Court of Appeals for the Fifth Circuit, *American Civil Liberties Union Foundation v. Bridges*, No. 02-30493, 2003 WL 21362357 (5th Cir. June 11, 2003), which was issued after Petitioner filed the Petition for Certiorari on June 3, 2003. The Fifth Circuit's decision widens the split of authority among the circuits concerning the scope of the Tax Injunction Act, 28 U.S.C. § 1341. Indeed, the Fifth Circuit expressly acknowledged that its holding was consistent with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), and inconsistent with *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), the decision below. *Bridges*, 2003 WL 21362357, at *5.

In *Bridges*, the court held that the Tax Injunction Act prevented the federal district court from hearing a First Amendment challenge to certain Louisiana state tax exemptions. The Louisiana tax statutes exempted non-profit religious organizations from paying state and local sales and use tax on revenue generated from selling certain religious materials. *Bridges*, 2003 WL 21362357, at *1. The Fifth Circuit held that the challenge to the exemptions fell within the scope of the Tax Injunction Act because determining whether an individual or organization qualifies for an exemption is part of the "assessment" process. *Id.* at *5. The court found the ordinary definition of assessment is "the entire plan or scheme fixed upon for charging or taxing," and therefore necessarily included the determination of exemptions. *Id.* (quoting *Webster's Third New International Dictionary* 131 (1981)). The court disagreed with the Ninth Circuit's reasoning in *Winn v. Killian* and distinguished the cases cited and relied upon by the Ninth Circuit. *Id.* and n.2.

The Fifth Circuit also found that its precedent and the purpose of the Tax Injunction Act supported its holding. *Id.* at *6. The court noted that it has always interpreted the Tax Injunction Act broadly because such a construction is consistent with the purposes of the Act. *Id.* It also noted that the taxpayers were not left without recourse because the "state legislature has provided an adequate scheme whereby a taxpayer may maintain a suit to challenge a state tax" and then secure a review by this Court if necessary. *Id.* (quoting *Bland v. McHann*, 463 F.2d 21, 24 (5th Cir. 1972)).

The decision in *Bridges* highlights the need for this Court to review the Ninth Circuit's decision below. The decision is now in conflict with the Fifth Circuit as well as the First, Sixth, and Eleventh Circuits, and is at odds with the purpose for the Tax Injunction Act. The Court should grant certiorari to resolve the conflict among the circuits and provide uniformity and certainty in the lower courts' application of the Tax Injunction Act.

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Supreme Court, U.S.
FILED
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No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS,
Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALASKA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, NEW JERSEY, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN AND TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Ninth Circuit err in holding, in conflict with the First, Fifth, Sixth and Eleventh Circuits, that the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity that traditionally restrain federal judicial interference with state tax systems do not require district courts to dismiss constitutional challenges to state tax credits that directly impact the administration of a State's tax system?

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INTEREST OF AMICI STATES

> [T]he individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. . . . [T]hey would under the plan of the Convention retain that authority in the most absolute and unqualified sense; and . . . an attempt on the part of the national Government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of this Constitution.

The Federalist No. 32 (Alexander Hamilton).

The States' vigilance in protecting their tax administration from federal intrusion is historic and understandable. Their concern to preserve a proper federal-state balance of interests in the treatment of taxpayer suits cannot reasonably be questioned.

The Ninth Circuit's decision in this case works an improper change in that federal-state balance. It does so (1) by unreasonably construing the word "assessment" in the "Tax Injunction Act," 28 U.S.C. § 1341, to render the Act inapplicable to proceedings that seek to enjoin Arizona's *calculation* of assessments to include certain "credits" afforded under state law;[1] and (2) by rewriting the Tax Injunction Act to incorporate exceptions found in the distinct Anti-Injunction Statute, 28 U.S.C. § 2283.

---

[1] The constitutional validity of the credits was confirmed by the Arizona Supreme Court in *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 528 (1999). Amici take no position on the merits of the claim that the credits violate the Establishment Clause.

The Ninth Circuit's analysis conflicts with that of other circuits. *See ACLU v. Bridges*, No. 02-30493; 2003 WL 21362357 (5th Cir. June 11, 2003); *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242 (11th Cir. 1991); *United States Brewers Ass'n, Inc. v. Perez*, 592 F.2d 1212, 1215 (1st Cir. 1979); *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988). Inasmuch as the construction of the Tax Injunction Act should be uniform throughout the nation, Amici States urge the Court to grant the petition of the State of Arizona, resolve the circuit conflict, and restore the proper balance of federal-state interests in matters of state taxation that has been established both by Congress in the Tax Injunction Act and by this Court's own jurisprudence.

SUMMARY OF ARGUMENT

Writing for a unanimous Court in 1997, Justice Kennedy described the unadorned absoluteness of the Tax Injunction Act's bar to taxpayer efforts at using the federal courts to interfere with state tax administration: "The statute, on its face, yields no exception to the jurisdictional bar save where the state remedy is wanting. . . . " *Arkansas v. Farm Credit Services,* 520 U.S. 821, 823 (1997). Nevertheless, despite the statute's manifest simplicity and clarity, and rather than adhere to this Court's recognition that the Tax Injunction Act is rooted "in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976), the Ninth Circuit has held that a district court may enjoin a State's inclusion of tax credits in the calculation of a tax assessment, if those tax credits are alleged to violate the First Amendment's Establishment Clause.

There is no such exception to the Tax Injunction Act. The court's holding rested on two defective grounds: First, the court reasoned, the Act's bar against district court restraint of state tax "assessment" does not bar restraint of allowance for tax "credits." App. 16-17. And second, the court implied an exception to the Act's preclusive effect for circumstances requiring federal courts to act as "guardians of the peoples' federal rights." App. 21.

The effect of the court's ruling is to call into serious doubt the continuing vitality of the Act's federalism underpinnings. As the dissent from the granting of en banc review correctly observed, the Ninth Circuit's opinion "disdainfully tosses away all that the Supreme Court has said on the issues as mere dicta." App. 10. By parsing the State's tax assessment process into sub-activities – such as deduction of tax credits from gross tax liability – that may be individually restrained, the Ninth Circuit's reasoning threatens to eviscerate the preclusive effect of the Tax Injunction Act, one element at a time. Likewise, the court's rewriting of the Tax Injunction Act to include a qualification for First Amendment claims effectively creates an exception that virtually swallows the rule.

In order to protect the critical balance of state and federal interests so carefully crafted by Congress and this Court, Amici States believe that immediate review of the Ninth Circuit's decision is necessary.

ARGUMENT

THE PETITION OF THE STATE OF ARIZONA SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S NOVEL ANALYSIS OF THE TAX INJUNCTION ACT AND THE ACT'S FEDERALISM UNDERPINNINGS THREATENS TO RENDER THE ACT A NULLITY.

A. The Ninth Circuit's Approach To Construing The Express Terms Of The Tax Injunction Act Threatens The Independence Of State Tax Administration By Inviting Courts To Parse Tax Administration Activities Into Constituent Subactivities That May Be Reached In Defiance Of The Act.

The Tax Injunction Act, 28 U.S.C. § 1341, enacted in 1937, provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Act embodies Congress' agreement with this Court's "'scrupulous regard for the rightful independence of state governments,'" *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932), quoted in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 (1981), and with the Court's belief that federal "courts should adopt a hands-off approach with respect to state tax administration" where there is an adequate remedy at law. *Nat'l Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 586 (1995). This Court has described the Tax Injunction Act as rooted "in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully*, 429 U.S. at 73; *see also Farm Credit Serv.*, 520 U.S. at 826-827; *Nat'l Private Truck Council*, 515 U.S. at 596; *Franchise Tax Board v. Alcan Aluminium Ltd.*, 493 U.S. 331, 338 (1990); *McNary*, 454 U.S. at 110; *California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982); *Roswell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981).

Underlying the Court's early jurisprudence was a recognition of the fundamental importance of tax revenue to state sovereignty:

> In our constitutional system, the power of the State to tax is a concurrent power. "That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the union; that it is to be concurrently exercised by the two governments: are truths which have never been denied." *McCulloch v. Maryland*, 4 Wheat. 316, 425 (1819). The power to tax is basic to the power of the State to exist. *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 444 (1940); *Roswell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522.

Farm Credit Serv., 520 U.S. 821, 826 (1997).

Using language that could hardly be clearer, this Court has noted that the Tax Injunction Act, "on its face, yields no exception to the jurisdictional bar save where the State remedy is wanting. . . ." *Farm Credit Serv.*, 520 U.S. at 823. But the Ninth Circuit sees it otherwise.

1. Ignoring the jurisprudential and federalism underpinnings of the Tax Injunction Act, *see e.g.*, App. 10 (Kleinfeld and O'Scannlain, JJ., dissenting from en banc review) (describing the panel's opinion as "disdainfully toss[ing] away all that the Supreme Court has said on the

issue as mere dicta . . ."), the Ninth Circuit erroneously restricted the broad reach of the statute. Focusing on the word "assessment," and selectively adopting a single dictionary definition of that term, the Ninth Circuit reasoned that the Act does not preclude federal court interdiction of an allowance of "credits" to an assessment, on the theory that such an interdiction has the effect of increasing, not diminishing, the collection of state tax revenue. *See* App. 16-17.

The reasoning is flawed. The amount of tax that is "assessed" by a State is the "bottom-line" amount that is owed by the taxpayer. *Cf.*, 26 U.S.C. § 6201(a)(1) ("[T]he Secretary shall assess all taxes shown on tax returns"), § 6203 ("[A]ssessment shall be made by recording the liability of the taxpayer.") Quite obviously, calculation of an "assessment" necessarily includes consideration of any available "credits" against the gross tax liability. A determination of whether a State's tax credits are properly available to a given taxpayer is part of the "entire plan or scheme fixed upon for charging or taxing." Webster's Third New International Dictionary 131 (1981). *See* Black's Law Dictionary 116-117 (6th ed. 1990). *See also Bridges*, 2003 WL 21362357 at 4-5; App. 3-5. Moreover, an injunction against an allowance of credits against liability is manifestly a restraint of the State's ability to calculate the ultimate assessment – a restraint that is precluded by the plain language of the Tax Injunction Act.

2. The Ninth Circuit's simplistic interpretation of the Tax Injunction Act is a bold assault on this Court's "hands-off policy with respect to state tax administration," *Nat'l Private Truck Council,* 515 U.S. at 586, and a clear threat

to state sovereign prerogatives in tax administration. The court's analysis suggests that the activities specified in the Tax Injunction Act – "assessment," "levy," and "collection" – may be parsed into constituent sub-activities that may themselves be restrained, even if the inclusive activity itself is immune from restraint under the Act. Indeed, rejecting as irrelevant this Court's reasoning in *Great Lakes Dredge & Dock Co. v. Hoffman*, 319 U.S. 293 (1943), and the Court's holding in *McNary*, 454 U.S. at 115, the Ninth Circuit reasoned that the tax credit at issue "is a limited discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes in other ways. . . ." App. 26. The potential mischief of the court's analysis is manifest. If allowed to stand, the Ninth Circuit's approach threatens to eviscerate the Tax Injunction Act "from within" – incrementally exempting from its anti-injunction reach component parts of the expressly identified tax-administration activities, until the Act is effectively gutted of any force or effect at all. As this Court has observed, "the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *McNary*, 454 U.S. at 114. Review by this Court, therefore, is critically warranted.

B. The Ninth Circuit's Improper Conflation Of The "Anti Injunction Act" And The "Tax Injunction Act" Threatens The Essential Federalism Underpinnings Of Congress' Guarantee Of State Taxing Independence.

Relying on this Court's opinion in *Mitchum v. Foster*, 407 U.S. 225 (1972), the Ninth Circuit justified its departure from the prohibition of the Tax Injunction Act and fundamental principles of comity by pointing to the role of

federal courts as "guardians of the people's federal rights". *See* App. 21 *quoting Mitchum*, 407 U.S. at 242. That reliance was misplaced.

Mitchum concerned the "Anti Injunction Act," 28 U.S.C. § 2283, not the "Tax Injunction Act." The former, unlike the Tax Injunction Act, provides: "A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (Italics added). The Court in *Mitchum* held that 42 U.S.C. § 1983 is just such an express congressional exception to the Act's bar to federal court interference with state court proceedings. *See Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970) ("On its face the present [Anti Injunction] Act is an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of the three specifically defined exceptions.").

In light of its limited holding in *Mitchum*, this Court did not invoke principles of comity in support of the State's position that such injunctions should not be permitted in any case. 407 U.S. at 242-243. ("[W]e conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the 'expressly authorized' exception of that law. . . . In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. . . . Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it was absolutely without power in this § 1983 action to enjoin a

proceeding pending in a state court under any circumstances whatsoever."). See *id.* at 244 (Burger, C.J., concurring). This analysis, of course, has no application to the *Tax Injunction Act*, which by its terms suffers no similar federal-law, comity or federalism qualifications to its sweep.

Thus, in *McNary*, this Court expressly invoked principles of comity to support a broad reading of the Tax Injunction Act's bar to federal court interference with state tax administration. 454 U.S. at 116; *but see* 454 U.S. at 124 n.11 (Brennan, J., concurring) (citing *Mitchum* in rejecting application of comity principles). Indeed, in marked contrast to the Court's treatment of 42 U.S.C. § 1983 in *Mitchum*, this Court has held that claims predicated on the federal civil rights act will not support even state court interference with state tax administration where there is an adequate remedy at law. *Nat'l Private Truck Council*, 515 U.S. at 591.

The Ninth Circuit's reliance on *Mitchum* is misplaced; the court's justification, unsound. Like its tortured construction of the Tax Injunction Act itself, the court's rewriting of the Act to add qualifications to the Act's applicability threatens to undermine the balance of state and federal interests struck by Congress. Review of the Ninth Circuit's ruling is, therefore, urgently requested.

CONCLUSION

For the foregoing reasons, Amici States urge the Court to grant the petition for a writ of certiorari.

Dated: July 16, 2003

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE,

Petitioner,

v.

KATHLEEN M. WINN, AN ARIZONA TAXPAYER; DIANE WOLFTHAL, ARIZONA TAXPAYER; MAURICE WOLFTHAL, ARIZONA TAXPAYER; LYNN HOFFMAN, AN ARIZONA TAXPAYER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed June 3, 2003
Certiorari Granted September 30, 2003

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The following opinions and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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[1] Some minor typographical errors have been corrected in the documents contained in this Joint Appendix. These changes, however, do not affect the substance of any of the documents.

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The following orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Respondents' Brief in Opposition:

Order of the United States Court of Appeals for the Ninth Circuit recalling mandate issued on October 25, 2002 ..... App. 1

Order of the United States Court of Appeals for the Ninth Circuit directing parties to file simultaneous briefs setting forth their respective positions on whether this case should be reheard en banc, dated November 13, 2002 ..... App. 2

The following letter has been omitted in printing this joint appendix because it appears in the appendix to the printed Petitioner's Reply Brief:

Letter to Paula S. Bickett from Cathy A. Catterson, Court Executive/Clerk of Court, United States Court of Appeals for the Ninth Circuit dated February 7, 2003 ..... App. 1

General Docket
US Court of Appeals for the Ninth Circuit

6/14/01	Filed certificate of record on appeal. RT filed in DC none. [01-15901] (jr)
6/18/01	Filed original and 15 copies aplts' opening brf (Informal: no) of 41 pages and five excerpts of record in 1 volume; served on 6/15/01. [01-15901] (jr)
6/18/01	Rec'd aplt's ntc of lodging documents with the court; served on 6/15/01 to (MOATT). [01-15901] (jr)
7/23/01	Filed original and 15 copies aple's 27 page brf; served on 7/18/01. [01-15901] (jr)
8/3/01	Filed original and 15 copies aplts' rpy brf (Informal: no) of 14 pages; served on 8/1/01. [01-15901] (jr)
4/23/02	FILED CERTIFIED RECORD ON APPEAL IN: 1 Clerks File (from DC transmittal) [01-15901] (jas)
6/11/02	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Dorothy W. NELSON, Stephen R. REINHARDT [01-15901] (gb)
10/3/02	FILED OPINION: REVERSED and REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Mary M. SCHROEDER; Dorothy W. NELSON; Stephen R. REINHARDT, author) FILED AND ENTERED JUDGMENT. [01-15901] (jr)
10/25/02	MANDATE ISSUED. Costs taxed against defendant in the amount of $383.80. [01-15901] (jr)

10/28/02 Filed order (Deputy Clerk: pa) the mdt issued on 10/25/02 in the above captioned appeal was in error and is RECALLED. [01-15901] (jr)

11/13/02 Filed order (Mary M. SCHROEDER, Dorothy W. NELSON & Stephen R. REINHARDT) the parties are directed to file simultaneous brfs setting forth their respective positions on whether this case should be reheard en banc. The brfs shall not exceed 15 pages and shall be filed within 21 days from the filed date of this order. Fifty copies should be filed. [01-15901] (jr)

11/27/02 Filed aple's motion for extension of time to file simultaneous brf, etc. [4578447-1] [01-15901]; served on 11/26/02 (FAXED TO PANEL). [4590680] (jr)

11/29/02 Filed order (Mary M. SCHROEDER, Dorothy W. NELSON, Stephen R. REINHARDT,): The aple's motion for an ext of time to file simultaneous briefs whether this case should be heard en banc is GRANTED. Both parties are directed to file their briefs on or before 12/31/02. (PHONED OUT 3:40) [01-15901] (hh)

12/30/02 Rec'd original and 50 copies aple's suppl brf of 15 pages; served on 12/27/02. Deficient; covers entitled "Petition for Rehearing and Rehearing En Banc. Notified counsel to submit corrected covers entitled "Suppl Brf". [01-15901] (jr)

12/30/02 Filed original and 50 copies aplts' suppl brf of 11 pages in response to order [4578447-1]; served on 12/27/02 to (PANEL & ALL ACTIVE JUDGES). [01-15901] (jr)

12/31/02 Rec'd 51 corrected covers from aple for suppl brf. [01-15901] (jr)

12/31/02 Filed original & 50 copies aple's suppl brf in response to order [4578447-1]; served on 12/27/02 to (PANEL & ALL ACTIVE JUDGES). [01-15901] (jr)

1/21/03 Rec'd (LATE) aple's motion for clarification of order recalling mdt [01-15901]; served on 1/17/03 to (SR). [4637070] (jr)

2/7/03 At direction of panel, clk's ltr dated 2/7/03 sent to aplt re: recalling mdt suspends the finality of judgment. [01-15901] (jr)

3/5/03 Filed order FOR PUBLICATION (Mary M. SCHROEDER, Dorothy W. NELSON, Stephen R. REINHARDT,): . . . The request for rehearing en banc is DENIED. KLEINFELD, Circuit Judge, with whom Circuit Judge O'SCANNLAIN joins, dissenting from denial of rehearing en banc. [01-15901] (hh)

3/17/03 MANDATE ISSUED. Costs taxed against defendant in the amount of $383.80. [01-15901] (jr)

6/23/03 Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 02-1809, filed on 6/3/03 & placed on dkt 6/16/03. [01-15901] (jr)

U.S. District Court
District of Arizona

2/15/00	1	COMPLAINT FILED (lsb) [Entry date 02/22/00]
2/23/00	2	RETURN OF SERVICE EXECUTED personally upon dft Mark W Killian (summons/complaint) on 2/18/00, by svc upon Sherry Scipione, Secretary, authorized to accept. (sd) [Entry date 02/25/00]
3/9/00	3	MOTION to dismiss for lack of subject matter jurisdiction by dft Mark W. Killian [3-1] (sd) [Entry date 03/10/00]
4/11/00	14	RESPONSE by plas to motion to dismiss for lack of subject matter jurisdiction by dft Mark W. Killian [3-1] (sd) [Entry date 04/12/00]
4/20/00	22	REPLY by dft Mark W. Killian to response to motion to dismiss case for failure to state a claim by intervenor Lisa Graham Keegan [6-1] (sd) [Entry date 04/24/00]
2/27/01	36	ORDER by Judge Earl H. Carroll granting motion to dismiss for lack of subject matter jurisdiction by dft Mark W Killian [3-1]. All other pending mtns are denied as moot. terminating case (cc: all counsel) (sd) [Entry date 02/27/01]

2/27/01	37	JUDGMENT: The Crt has granted dft's mtn to dismiss for lack of subj matter jurisdiction; therefore, plas take nothing and their complaint and action are hereby dismissed. (cc: all counsel) (sd) [Entry date 02/27/01]
3/27/01	38	NOTICE OF APPEAL by all plas from District Court judgment [37-1], and order [36-2] (cc: 2CCA/All Counsel/EHC) (rew) [Entry date 05/02/01] [Edit date 11/08/02]
3/27/01	39	Notice of Transcript Designation; no transcripts to be ordered (rew) [Entry date 05/02/01]
5/2/01	–	REMARK; CADS forwarded to Ninth Circuit this date (rew) [Entry date 05/02/01]
5/2/01	–	Certificate of Record Transmitted to 9CCA [38-1] (rew) [Entry date 05/02/01]
11/7/02	41	CERTIFIED COPY of the 9th Circuit Mandate reversing and remanding the decision of the District Court; we reverse the district court's grant of AZ's motion to dismiss and remand the case for further proceedings, re: 01-15901 [Appeal [38-1]] Case reopened [41-1] [41-1] (cc: all counsel/judge) (rew) [Entry date 11/07/02]
11/8/02	42	Certified Copy of 9th Circuit Order; the mandate issued 10/25/02 was in error and is recalled, re: appeal [38-1] (cc: all cnsl/judge) (case re-closed) (rew) [Entry date 11/08/02]

3/10/03	–	Original Record Returned from 9th Circuit re [38-1] 1 volume original file; (rew) [Entry date 03/10/03]
3/27/03	43	CERTIFIED COPY of 9th Circuit Mandate reversing and remanding the decision of the District Court; we reverse the district court's grant of AZ's motion to dismiss and remand the case for further proceedings, re: 01-15901 [38-1] Case reopened [43-1] (43-1] (cc: all counsel/judge) (rew) [Entry date 03/27/03]

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs, v. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV '00 0287 PHX EHC **COMPLAINT**

Plaintiffs, by and through their counsel undersigned, hereby make the following complaint against Defendant:

Parties

1. Plaintiffs, Kathleen M. Winn, Diane and Maurice Wolfthal, and Lynn Hoffman, are citizens and residents

of Arizona, who pay Arizona income taxes on income earned in Arizona.

2. Defendant Mark W. Killian is Director of the Arizona Department of Revenue. Defendant Killian is responsible under state law for the administration of Arizona's income tax laws, including A.R.S. § 43-1089, the constitutionality of which is challenged in this action.

Jurisdiction

3. Plaintiffs allege that A.R.S. § 43-1089, on its face and as administered by Defendant Killian, deprives them of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek relief pursuant to the United States Constitution and 42 U.S.C. § 1983. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a), and venue pursuant to 28 U.S.C. § 1391(b).

Factual Allegations

4. Plaintiffs challenge the constitutionality, on its face and as applied, of A.R.S. § 43-1089, enacted in 1997. A copy of A.R.S. § 43-1089 is attached to this complaint as Exhibit A.

5. A.R.S. § 43-1089 provides for a "tuition tax credit," such that any taxpayer who pays Arizona income taxes may satisfy up to $500 of his, her, or its annual state income tax obligation by paying that amount to a "school tuition organization" ("STO") instead of to the State.

6. Pursuant to A.R.S. § 43-1089, an STO must, in turn, use at least 90% of the payments it receives from

taxpayers for tuition grants to children to attend private primary or secondary schools in Arizona.

7. Taxpayers who make payments to any STO in a given tax year receive a 100%, dollar-for-dollar credit on the state income taxes that are due from them for that year, i.e., they may reduce the income tax paid to the State for that year by the entire amount, up to $500 per year, paid to an STO.

8. Taxpayers are not required to have children in school or to have incurred any educational expenses (or any other expenses) in order to claim the 100% tax credit for payments made to STOs.

9. The amounts paid to STOs by taxpayers and claimed by taxpayers as credits toward payment of Arizona income taxes are not contributions of taxpayer funds to the STOs, because taxpayers incur no cost in making such payments. The amounts are, instead, contributions of state funds to the STOs, because the amounts paid to STOs reduce state income tax revenues on a dollar-for-dollar basis.

10. A.R.S. § 43-1089 places no limit on the total amount of State funds that may be diverted to STOs each year. If one million Arizona taxpayers utilized the STO credit each year, the amount of State income tax revenues annually diverted to STOs would be $500 million.

11. STOs must make tuition grants of State funds available to students at more than one non-public school. As long as they do so, STOs may (and most do) restrict their grants to students attending religious schools. An STO may, for example, make tuition grants of State funds available only to children attending Catholic schools, only to children attending Lutheran schools, only to children attending Christian schools or only to children attending Jewish

schools. STOs may also restrict their grants of State funds only to children of a specific religious denomination, for example, Catholic children, Lutheran children, Christian children or Jewish children.

12. STOs that restrict their grants to students attending religious schools use state funds solely for the purpose of enabling children to attend religious schools at State expense.

13. A.R.S. § 43-1089 thus authorizes the formation of agencies that have as their sole purpose the distribution of State funds to children of a particular religious denomination or to children attending schools of a particular religious denomination.

14. The money used by STOs for grants to students attending religious schools would otherwise have been paid into the state general fund by the taxpayers making those donations. The diversion of those funds to such STOs therefore reduces the balance of the state general fund on a dollar-for-dollar basis.

15. As of the end of August, 1999, 15 STOs had reported data to the Arizona Department of Revenue regarding funds received and/or tuition grants awarded during calendar year 1998. Of the total of $1,815,799 received from taxpayers by all STOs in 1998, at least $1,708,769, or 94%, went to STOs restricting tuition grants of state funds to students attending religious schools.

16. The largest STO recipient of income tax revenues during the 1998 calendar year was The Catholic Tuition Organization of the Diocese of Phoenix, which received $837,140. The Catholic Tuition Organization restricts its grants to students attending Catholic schools in the Diocese of Phoenix. Eligible schools include, for example, Saint Mary's High School. The advertised mission of Saint Mary's is "to provide a

quality Catholic education by developing and sustaining a rich tradition grounded in Gospel and family values . . ." Another eligible school is St. Louis the King School, which advertises that "Gospel values and self-discipline skills are infused into the total curriculum." Another eligible school, St. John Vianney School, advertises that Christ "is the unseen but ever present teacher in its classes."

17. The second largest STO recipient of income tax revenues was Arizona Christian School Tuition Organization, which received $538,611. The Arizona Christian School Tuition Organization restricts its grants to students attending "evangelical" Christian schools in Arizona.

18. The third largest STO recipient of income tax revenues was Brophy Community Foundation, which restricted grants to children attending two Catholic schools (Brophy College Preparatory for boys and Xavier College Preparatory for girls) and which received $163,603. The advertised philosophy of Xavier College Preparatory includes such goals as "instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church." Brophy College Preparatory's advertised mission includes the goal of offering students "an intimate relationship with God" through "the process of nurturing the soul."

19. The three religious STOs described above, which controlled 85% of the total STO donations during 1998, made no scholarship grants at all during that year. Despite the unavailability of that significant pool of funds, 75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the schools receiving scholarships were religious schools.

20. During 1998, the STO making the largest amount of tuition grants was Christian Scholarship of Arizona; the STO making the second largest amount of grants was Northern Arizona Christian School Scholarship; the STO making the third largest amount of grants was Higher Education Lutherans Program.

21. The school receiving the largest amount of STO funded tuition payments during 1998 was the Casas Adobes Baptist School in Tucson; the school receiving the second largest amount was the Palo Verde Christian School in Tucson; the schools receiving the third and fourth largest amounts were the Son Rise Christian School and the Sedona Christian School. Each of these schools is pervasively sectarian.

22. Upon information and belief, STOs received and granted a much larger amount of income tax revenue for calendar year 1999, due in part to the absence of any constitutional attack on the program for most of the year and to the public's greater familiarity with the program. Upon information and belief, the Catholic Diocese of Phoenix collected more than $4.5 million for its STO during 1999. The Catholic Diocese of Tucson recently announced that it had collected more than $850,000 for its STO during the same time period, and the Brophy Community Foundation announced that its 1999 donations exceeded $640,000.

23. Except for a statutory prohibition on making grants to children attending schools that discriminate on the basis of race, color, handicap, familial status or national origin, STOs may utilize any standards they wish for making tuition grants of State funds to students attending non-public schools, including preferences for students of a particular religious denomination. STOs need not make grants on the basis of financial need or academic performance. STOs may

also make grants to students attending schools that discriminate on the basis of religion and/or sex in accepting students.

24. Religious schools that receive tuition payments made with STO-granted State funds may and do use those payments to support religious instruction and worship. Those schools and the STOs that support them encourage taxpayers to take advantage of the tax credit program in order to further religious education.

25. A.R.S. § 43-1089 does not require or insure that tuition grants of State funds will be available to parents choosing to send their children to non-religious, non-public schools.

26. Because a very large majority (at least 94% in 1998) of STO funds are controlled by religion-specific STOs, parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing and able to make a tuition grant to a student attending the non-religious school of the parents' choice. The tax credit scheme is, therefore, not religion-neutral in its operation.

27. Although A.R.S. § 43-1089(D) prohibits a taxpayer from designating his or her donation for the benefit of any dependent of the taxpayer, the statute does not prohibit two taxpayers from each designating his or her donation for the benefit of the other taxpayer's child, or a taxpayer from designating his or her donation for the benefit of a non-dependent relative (for example, a grandchild).

28. The statute also does not prohibit, for example, two or more religious schools from setting up an STO (like the Brophy Community Foundation, which serves two Catholic schools) and inviting parents to participate in a "contribution exchange," by which

each of their children would receive a $500 scholarship paid for by another participating parent. All parents would then be fully reimbursed for their contributions by the State of Arizona.

Allegations of Law

29. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at religious schools, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

30. By affirmatively authorizing and permitting STOs to use State income-tax revenues to make tuition grants to students attending only religious schools or schools of only one religious denomination or to students of only one religion, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

31. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at schools that discriminate on the basis of religion in selecting students, § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

32. As a direct consequence of Defendant Killian's violation of Plaintiffs' constitutional rights, Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program described above.

33. Prior litigation was filed in the Arizona Supreme Court challenging the constitutionality of A.R.S. § 43-1089

(*Kotterman v. Killian*, 972 P.2d 606, *cert. denied*, __ S. Ct. __ (1999)). Plaintiffs' Complaint is not barred by res judicata because, among other things, neither Plaintiffs nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation, and no challenge was made in that litigation based on the actual practical effect of the statutory scheme, as the lawsuit was filed prior to the effective date of the statute.

Relief

Wherefore plaintiffs respectfully request:

A. Preliminary and permanent injunctive relief prohibiting defendant from allowing taxpayers to utilize the tax credit authorized by A.R.S. § 43-1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion;

B. A declaration that A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution by affirmatively authorizing STOs to use State income-tax revenues to pay tuition for students attending religious schools or schools that discriminate on the basis of religion; and

C. An order that Defendant Killian inform all STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion, that all funds in their possession as of the date of this Court's order must be paid into the state general fund.

D. An award of attorneys' fees, expert fees, if any, and other costs, pursuant to 42 U.S.C. § 1988(b) and (c), the private attorney general doctrine, and any other applicable authority or rule of equity.

E. All other relief that this Court deems just and appropriate in the circumstances.

DATED this 15th day of February, 2000.

s/Marvin S. Cohen
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs, vs. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV 00-0287-PHX-EHC MOTION TO DISMISS

Defendant Mark W. Killian, Director of the Arizona Department of Revenue ("Department"), moves pursuant to Fed. R. Civ. P. 12(b)(1) for an Order dismissing the Complaint filed by Plaintiffs because the Tax Injunction Act and the Eleventh Amendment deprive the Court of subject matter jurisdiction over the action.

This Motion to Dismiss is supported by the attached memorandum.

RESPECTFULLY SUBMITTED this 9th day of March, 2000.

JANET NAPOLITANO
Arizona Attorney General

PATRICK IRVINE
Assistant Attorney General

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiffs challenge the constitutionality of a State tax credit for contributions to School Tuition Organizations. A.R.S. § 43-1089. An identical challenge has been rejected by the Arizona Supreme Court. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999). The United States Supreme Court denied two petitions for writs of certiorari seeking review of the Arizona decision. *Rhodes v. Killian*, 120 S.Ct. 42 (1999); *Kotterman v. Killian*, 120 S.Ct. 283 (1999).[1]

Plaintiffs now seek to obtain in this Court the relief the petitioners in *Kotterman* could not obtain from the Arizona Supreme Court or the United States Supreme

[1] Plaintiffs state that neither they nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation. Complaint ¶ 33. The Arizona Civil Liberties Union did, however, file an amicus curiae brief in the Arizona Supreme Court. The Arizona Civil Liberties Union also provided counsel to Louis Rhodes, a petitioner in *Kotterman*, in preparing his petition for writ of certiorari to the United States Supreme Court.

Court. This Court, however, lacks jurisdiction to hear the issue. Both the United States Constitution and a federal statute bar federal court jurisdiction over this issue. Therefore, the Complaint should be dismissed.

II. THE TAX INJUNCTION ACT BARS FEDERAL COURTS FROM HEARING CHALLENGES TO STATE TAX LAWS.

The Plaintiffs' suit in District Court is barred by the Tax Injunction Act, 28 U.S.C. § 1341, which provides:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

The Tax Injunction Act requires taxpayers to seek redress of issues related to state tax liability in state, rather than federal, court. This principle applies with equal force to actions brought under 42 U.S.C. § 1983, as well as to actions seeking declaratory and injunctive relief. *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995) (concluding that "Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law."); *see also Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981) (holding that taxpayers are barred by the principle of comity from asserting § 1983 damages actions in federal courts based on the administration of state tax systems); *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (28 U.S.C. § 1341 applies to declaratory as well as injunctive relief).

As the Supreme Court explained in *National Private Truck Council*:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. Immediately prior to the enactment of § 1983, the Court articulated the reasons behind the reluctance to interfere:
>
> > "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. Chicago*, 11 Wall. 108, 110, 20 L.Ed. 65 (1871).
>
> Since the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the Tax Injunction Act in 1937 is one manifestation of this aversion. See 28 U.S.C. § 1341 (prohibiting federal courts from enjoining the collection of any state tax "where a plain, speedy and efficient remedy may be had in the courts of the State"). We subsequently relied upon the Act's spirit to extend the prohibition from injunctions to declaratory judgments regarding the constitutionality of state taxes. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Later, we held that the Tax Injunction Act itself precluded district courts from awarding such declaratory judgments.

512 U.S. at 586, 115 S.Ct. at 2354.

It cannot be disputed that Arizona provides a plain, speedy and efficient remedy in this case. The Arizona courts are open to Plaintiffs, just as they were to the petitioners in *Kotterman*.

Plaintiffs ask this Court to significantly interfere with the administration of Arizona's income tax by enjoining the allowance of a tax credit that is an integral part of the calculation of tax due. The Court would be ordering the State to tax some taxpayers more by denying them a tax credit authorized by State law. The interference with State tax administration would be no less than an order that some taxpayers be taxed less. In either case, this Court would be determining how much the State must assess certain taxpayers. Federal court jurisdiction over such a determination is plainly barred by both the language and spirit of the Tax Injunction Act.

III. THE ELEVENTH AMENDMENT DEPRIVES FEDERAL COURTS OF JURISDICTION TO HEAR THIS CASE.

The Eleventh Amendment, by its terms, deprives federal courts of jurisdiction of suits that private persons who live in another state or in a foreign country bring against a State. The Supreme Court has interpreted the Amendment as also depriving federal courts of jurisdiction of suits that private persons bring against their own States. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 1122 (1996), the Court explained that it has interpreted the Amendment "not so much for what it says," but for the two-part presupposition that it confirms: "first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an

individual without its consent." (Citations omitted.) A suit against a State officer in his or her official capacity is considered a suit against the State for Eleventh Amendment immunity purposes. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

There are three exceptions to the rule that a private person cannot sue his or her State in federal court. A person may do so when (1) Congress has abrogated a State's sovereign immunity; (2) a State has waived its sovereign immunity by consenting to suit; or (3) the person is seeking to enjoin a state officer from committing a future violation of federal law. Exception (1) does not apply here because Congress has not enacted any statute purporting to abrogate Arizona's sovereign immunity regarding state tax issues. Similarly, exception (2) does not apply because Arizona has not consented in any way to this lawsuit. *See Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 473-74 (1987) (stating that because a State's "constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued," a State does not waive its sovereign immunity in federal court by waiving it in its own courts). Therefore, exception (3) is the only possible basis for federal court jurisdiction, yet it too does not apply to this challenge to Arizona tax law.

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held that the Eleventh Amendment did not deprive the federal courts of jurisdiction of suits by private persons that sought to enjoin state officers from committing future violations of federal law. It did so based on the fiction that such suits, unlike official capacity suits generally, were not suits against the States because the States could not authorize their officers to violate federal law and state

officers who did so were therefore stripped of their capacity as state representatives. The *Ex parte Young* exception is a narrow one, however, as the Supreme Court recently made clear in *Seminole Tribe* and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028 (1997).

Seminole Tribe involved an attempt by an Indian tribe to force the State of Florida to comply with provisions of the Indian Gaming Regulatory Act. The suit named the State and the Governor and sought to invoke the *Ex parte Young* rule allowing for federal jurisdiction over claims for prospective injunctive relief against state officials. The Court held that *Ex parte Young* should not be invoked where Congress "has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right. . . ." 116 S.Ct at 1132. The Tenth Circuit has interpreted the decision as imposing

> [A]n obligation for the federal courts to examine Congress' stated intent with respect to the scope of statutory remedies that may be available in any case where an *Ex parte Young* issue is raised. The crucial inquiry is whether Congress has expressed an intent, through some kind of statutory scheme, to limit or prevent potential remedies in a private cause of action even though broader remedies might otherwise be available against the state through the *Ex parte Young* rule. If so, then under *Seminole Tribe*, the federal courts are not ordinarily free to go beyond that congressional intent.

ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1189 (10th Cir. 1998).

Coeur d'Alene further limited the exception. The case involved a federal suit by an Indian tribe seeking a

declaratory judgment establishing its right to quiet enjoyment over the submerged lands of a lake, as well as prospective relief against numerous State officials. The Court was badly divided, but in a portion of the opinion that was joined by five justices, the Court stated:

> An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction. However, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests. . . . We must examine the effect of the Tribe's suit and its impact on these special sovereignty interests in order to determine whether the *Ex parte Young* fiction is applicable.
>
> * * *
>
> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

521 U.S. at 281, 287-88, 117 S.Ct. at 2040, 2043.

Under both *Seminole Tribe* and *Coeur d'Alene* the Eleventh Amendment bars federal courts from hearing a challenge to a state tax law. The Tax Injunction Act is exactly the kind of remedial measure enacted by Congress that *Seminole Tribe* held deprives federal courts of

jurisdiction. *See ANR Pipeline*, 150 F.3d at 1191 ("[W]e conclude that the *Ex parte Young* doctrine may not be invoked for the pipelines' prospective claims that seek relief that is precluded by the Tax Injunction Act."). Congress has made it clear in the Tax Injunction Act that disputes regarding state tax laws should be heard in State courts, even when those disputes involve issues of federal law.

Coeur d'Alene also compels the conclusion that the Eleventh Amendment bars this suit because federal jurisdiction over a State tax dispute plainly "implicates special sovereignty interests" of the State. *See National Private Truck Council*, 515 U.S. at 586, 115 S.Ct. at 2354 ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *ANR Pipeline*, 150 F.3d at 1193 ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.").

In *ANR Pipeline* the Tenth Circuit recently held that the Eleventh Amendment bars a state tax challenge, finding that both *Seminole Tribe* and *Coeur d'Alene* bar the suit. The court concluded:

> The Supreme Court has held that in cases implicating the core powers of a state qua state, the Eleventh Amendment directs a litigant to the state's courts. Of course, a litigant always may seek review of the state court decisions by the U.S. Supreme Court through a petition for certiorari. *See* 28 U.S.C. § 1257. As lower federal courts, however, this court and the federal district court in Kansas may not entertain the pipeline's suit ultimately seeking federal declaratory relief

against the tax policy of the state of Kansas. The relief sought by the pipelines impermissibly intrudes upon Kansas' "dignity and status" as a sovereign government.

150 F.3d at 1194.

Plaintiffs' suit similarly seeks relief against the tax policy of the State of Arizona. They may seek relief in the courts of Arizona and may ultimately seek review by the United States Supreme Court. They cannot, however, seek relief in the federal courts because the Eleventh Amendment immunizes the State of Arizona and its tax officials from suit.

CONCLUSION

The Tax Injunction Act and the Eleventh Amendment deprive this Court of subject matter jurisdiction over this action. Therefore, the Complaint should be dismissed.

RESPECTFULLY SUBMITTED this 9th day of March, 2000.

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Copy of the foregoing mailed this
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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Kathleen M. Winn, an Arizona taxpayer; Diane Wolfthal, an Arizona taxpayer; Maurice Wolfthal, an Arizona taxpayer; and Lynn Hoffman, an Arizona taxpayer, Plaintiffs, v. Mark W. Killian, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV 00 02 87 PHX EHC **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** (Oral Argument Requested)

Plaintiffs hereby respond to Defendant Mark W. Killian's Motion to Dismiss this litigation for lack of subject matter jurisdiction. Defendant claims that the Tax Injunction Act and the Eleventh Amendment prevent this

Court from determining the constitutionality of a state tax credit system that funnels millions of dollars that would otherwise go to the state general fund directly into private religious schools. This argument is without merit, as set forth in the attached Memorandum of Points and Authorities, and Defendant's Motion should therefore be denied.

DATED this 11th day of April, 2000.

SACKS TIERNEY, P.A.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant argues that the Federal Tax Injunction Act of 1937, 28 U.S.C. §1341, and the Eleventh Amendment to the United States Constitution each deprive this Court of subject matter jurisdiction in this case. Both of these contentions are plainly incorrect. The Tax Injunction Act is inapplicable because Plaintiffs do not seek to interfere with the collection of state taxes. The Eleventh Amendment is inapplicable because Plaintiffs seek prospective relief against a state official under the well-established doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Defendant's motion to dismiss should therefore be denied in its entirety.

II. THE TAX INJUNCTION ACT IS INAPPLICABLE TO THIS CASE BECAUSE PLAINTIFFS DO NOT SEEK TO "ENJOIN, SUSPEND OR RESTRAIN THE ASSESSMENT, LEVY OR COLLECTION OF ANY [STATE] TAX."

The Tax Injunction Act, 28 U.S.C. §1341 provides that:

> The district courts *shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law* where a plain, speedy and efficient remedy may be had in the courts of such state.

(Emphasis added.) The plain language of the Tax Injunction Act makes it clearly inapplicable to this case. Plaintiffs do not seek to invalidate any state tax or to interfere in any way with the State's ability to "assess, levy or collect" taxes. Quite to the contrary, Plaintiffs seek to invalidate a state statute providing for a state income-tax *credit*, on the ground that the credit violates the Establishment of Religion Clause of the First Amendment. If Plaintiffs are successful in this challenge, and the credit is held to be unconstitutional, the result will be to *increase*, rather than to reduce, the amount of income tax the State will be entitled to collect.[1] There will be no restraint whatsoever on the State's ability to collect taxes.

[1] According to a recent article in The Arizona Republic, at least $13,315,712 was diverted to private schools as a result of the tax credit in question, at least $11,058,628 of that amount to private religious schools. *See* Karina Bland, "School Tax Credits Wide Open to Abuse," The Arizona Republic, April 9, 2000, at A1, A22. If Plaintiffs are successful, the state will save millions of dollars a year.

The United States Supreme Court has held on numerous occasions that the Tax Injunction Act has no application to litigation that would increase the taxes due to the State. *See, e.g., Jefferson County, Alabama v. Acker,* 119 S. Ct. 2069, 2076 (1999), in which the Court recently held that the Tax Injunction Act "is to be enforced according to its terms. . . . By its terms, the Act bars . . . suits to stop ('enjoin, suspend or restrain') the collection of taxes. . . . "[A] suit to collect a tax is surely not brought to restrain state action, and therefore does not fit the Act's description of suits barred from federal district court adjudication. . . . The Tax Injunction Act was . . . shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings." *See also California v. Grace Brethren Church,* 457 U.S. 393, 408 (1982) ("It is plain from [the language of the statute] that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction *enjoining the collection of state taxes.*") (Emphasis added.*); Rosewell v. LaSalle National Bank,* 450 U.S. 503, 522 (The Act is intended to prevent interference with tax collection.); 17 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4237 (1988) (The Tax Injunction Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as *the collection of taxes.*") (Emphasis added.)

This "plain meaning" interpretation of the Tax Injunction Act has been explicitly adopted in the Ninth Circuit. *See, e.g., Jerron West, Inc. v. California State Board of Equalization,* 129 F.3d 1334, 1338 (9th Cir. 1997) ("[T]he Act prohibits relief where it would result in *a restraint on tax assessment. . . .*") (Emphasis added.). In *Hoohuli v.*

Ariyoshi, 741 F.2d 1169, 1177 (9th Cir. 1984), the Ninth Circuit held that the Act had no application to a case in which "the requested relief would not 'enjoin, suspend or restrain the assessment, levy or collection' of a state tax." The Court observed that the Act arose from congressional concerns that "[d]uring the pendency of the federal suit the *collection of revenue* under the challenged law might be obstructed, with consequent *damage to the State's budget. . . .*" (Emphasis added.) It bears repeating that, in seeking to invalidate the State tax credit in the present case on Establishment Clause grounds, Plaintiffs do not wish to obstruct the State's collection of revenue, to reduce State revenues, or to restrain tax collection in any way. Plaintiffs' claim is that the State is unconstitutionally *declining* to collect income tax revenue, by permitting that revenue to be diverted to religious purposes rather than paid to the State.

A recent federal district court decision in Rhode Island, in a case analytically identical to the present action, holds the Tax Injunction Act plainly inapplicable. Plaintiffs in that case challenged the exemption of religious organizations from state unemployment taxes as a violation of the Establishment Clause. There, as here, the State's Attorney General moved to dismiss for lack of jurisdiction on the basis of the Tax Injunction Act. The Court correctly found the contention to be entirely without merit. *Rojas v. Fitch,* 928 F. Supp. 155 (D.R.I. 1996). The Court's analysis was as follows:

> It is clear from the very text of the [Tax Injunction Act] that it is not applicable in this instance. The present action is not an action to "enjoin, suspend or restrain" the collection of taxes. In fact, it is quite the opposite. This is, in essence,

> an action to compel the State of Rhode Island to collect taxes. *See Moton v. Lambert,* 508 F. Supp. 367, 368 (N.D. Miss. 1981) (Plaintiff's action to invalidate tax exemption for racially segregated schools was not [barred] because it was a "demand that taxes be collected and not enjoined.")
>
> . . . [B]ecause this action does not seek to enjoin or suspend the assessment and collection of taxes, the Tax Injunction Act does not apply.

Id. at 159-60.

In this case, Defendant seeks to apply the Tax Injunction Act to preclude federal district courts not only from interfering with State tax collection, but from considering any issue involving "the administration of state tax systems." Defendant's Memorandum in support of Motion to Dismiss, pp. 4-5. This reading of the statute is completely unsupported by either the language of § 1341 or by any relevant authority. Indeed, Plaintiffs have been unable to find any federal case, and Defendant cites none, in which the Tax Injunction Act has been held to preclude a federal suit merely because a state tax system was involved, when the suit did not seek actually to interfere with State tax collection. To the contrary, as the Supreme Court, the federal Courts of Appeal,[2] other federal courts, and respected commentators have consistently agreed, the

[2] There is, so far as we can tell, no disagreement among the Circuits on this issue. *See, e.g., Wells v. Malloy,* 510 F.2d 74 (2d Cir. 1975) (Friendly, J.); *Hargrave v. McKinney,* 413 F.2d 320 (5th Cir. 1969); *Dunn v. Casey,* 808 F.2d 555, 558 (7th Cir. 1986) ("The text of § 1341 does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise *additional* taxes.") (Emphasis added.)

purpose of the Tax Injunction Act was and still is to shield States from federal suits that would interfere with the collection of tax revenue, not to preclude federal district court jurisdiction whenever State tax legislation is challenged as unconstitutional.

If any further evidence were required of the incorrectness of the defendant's interpretation of the Tax Injunction Act, it is provided by the two leading Supreme Court cases regarding the validity, under the Establishment Clause, of State tax credits and deductions for tuition of children attending religious schools. In *Committee for Public Education v. Nyquist,* 413 U.S. 756, 789-98 (1973), the Court held State income-tax credits for religious school tuition payments to be unconstitutional. In *Mueller v. Allen,* 463 U.S. 380 (1983), the Court upheld State income-tax deductions for religious school expenses against an Establishment Clause attack. Both of those cases originated as federal district court challenges to the constitutionality of State tax laws and policy. In addition, both were initiated well after passage of the Tax Injunction Act. If Defendant's interpretation of the Act were correct, the district courts in both cases would have lacked subject matter jurisdiction and the Supreme Court would, consequently, have lacked jurisdiction to address the issues on the merits. In addition, because lack of subject matter jurisdiction is not a waivable issue, the Supreme Court would have been required to dismiss the cases even if the parties themselves had not raised the Tax Injunction Act issue. In both cases, however, the Supreme Court reached and decided the merits of the constitutional challenges. Furthermore, in neither Supreme Court opinion is there any mention whatsoever of the Tax Injunction Act.

Clearly, the Court in *Nyquist* and *Mueller* did not invoke the Tax Injunction Act because it was, by its terms and as consistently construed, inapplicable. The Establishment Clause challenges to State income tax credits and deductions in those cases, like the challenge in the present case, did not seek to prevent the States from collecting tax revenue. The challenges asserted the constitutional invalidity, not of State *taxes*, but of *exemptions or exclusions* from State taxes. The Tax Injunction Act simply has no application to such matters.

III. THE PRESENT SUIT IS NOT BARRED BY THE ELEVENTH AMENDMENT.

Plaintiffs in this case have brought suit against the Director of the Arizona Department of Revenue, in his official capacity, for prospective relief in order to prevent a continuing violation of the United States Constitution. It has been clear, since the Supreme Court's decision *in Ex parte Young*, 209 U.S. 123 (1908), that such a suit for prospective relief against a state official is not barred by the Eleventh Amendment. *See, e.g.,* I TRIBE, AMERICAN CONSTITUTIONAL LAW 555-56 (3d ed.): "[T]he Eleventh Amendment . . . does not ordinarily prevent federal courts, even in the absence of express congressional authorization, from requiring states, through their officers, to comply with prospective federal injunctions." *See also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n. 10 (1989) ("Official-capacity actions for prospective relief are not treated as actions against the State."); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) ("A suit challenging the constitutionality of a state official's action is not one against the State. This was the holding in *Ex parte Young*. . . . ").

The doctrine of *Ex parte Young* "truly embodies a bedrock principle of American law." TRIBE, p. 564. That bedrock principle continues to govern the application of the Eleventh Amendment, even after the Supreme Court's recent decisions expanding the scope of the sovereign immunity doctrine. *See, e.g., Currie, "Ex parte Young* after *Seminole Tribe*," 72 N.Y.U. L. Rev. 547 (1997) ("My message is one of calm placidity . . . *Ex parte Young* is alive and well and living in the Supreme Court."); Monaghan, Comment, "The Sovereign Immunity Exception," 110 Harv. L. Rev. 102, 103 (1996) ("[T]he rule of *Ex parte Young* remains in full force. In suits for prospective relief, states are still accountable in federal court–through their officers – for the violation of federal law.").

Defendant nevertheless argues, contrary to this well-established authority, that the present suit is barred by the Eleventh Amendment. Defendant's convoluted Eleventh Amendment argument appears to be based primarily on his incorrect contention, addressed above, that the present suit is barred by the Tax Injunction Act. Thus, after observing that the Supreme Court, in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), has recently held that the *Ex parte Young* exception to the Eleventh Amendment does not apply when Congress "has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right," Defendant argues that "[t]he Tax Injunction Act is exactly [that] kind of remedial measure. . . ." Defendant's Memorandum, p. 8. Defendant then invokes the Tenth Circuit's decision in *ANR Pipeline Co. v Lafaver,* 150 F.3d 1178, 1191, that "the *Ex parte Young* doctrine may not be invoked for . . . claims that seek relief that is precluded by the Tax Injunction Act."

As discussed in Part II of this Memorandum, the Tax Injunction Act plainly does not preclude Plaintiffs' claim that Arizona's tuition tax credit scheme violates the Establishment Clause. Thus, even if defendant and the Tenth Circuit are correct that the *Ex parte Young* holding does not apply to suits for prospective relief that are barred by the Tax Injunction Act, that principle is completely irrelevant here.[3]

Defendant also suggests that the Supreme Court's 1997 decision in *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, "compels the conclusion that the Eleventh Amendment bars this suit because federal jurisdiction over a State tax dispute plainly 'implicates special sovereignty interests' of the State." Defendant's Memorandum, p. 8. This suggestion is also without substance. In *Coeur d'Alene*, the Supreme Court held that the Eleventh Amendment barred an Indian tribe's suit for prospective relief against State officials, despite *Ex parte Young*, because the suit was "the functional equivalent of a quiet title action." As such, it was "fully as intrusive [upon the State] as almost any conceivable retroactive levy upon funds in its Treasury." 521 U.S. at 281, 287-88. The same cannot possibly be said about the Establishment Clause claim in this case. The tribe's action against the State in *Coeur d'Alene* was "functionally equivalent" to a retrospective monetary damages claim against a State because, if

[3] It is, in fact, doubtful whether the holding of *ANR Pipeline* is correct. The Tax Injunction Act, when applicable, hardly seems to be a congressionally enacted "detailed remedial scheme for the enforcement against a State of a statutorily created right." Since the Act is inapplicable here, however, the correctness of *ANR Pipeline* is not implicated in this case.

successful, it would have deprived the State of property to which the State claimed ownership. In utter contrast, Plaintiffs' claim in this case, if successful, would deprive the State of neither money nor property. It would, instead, result in a substantial *increase* in State income tax revenues.

Defendant seems to advance the view that, as a result of *Coeur d'Alene*, all aspects of State "tax policy" are somehow immune from constitutional attack in federal district court. Defendant's Memorandum, p. 9. Such a contention, if successful, would require the overruling of at least two Supreme Court decisions (*Nyquist* and *Mueller*) in which State tax policies were subjected to constitutional attack in federal court. Defendant's contention would, in addition, broadly exclude from federal district jurisdiction even the most egregious Establishment Clause violations. Under Defendant's proposed principle, for example, this Court would have no subject matter jurisdiction over a taxpayer suit challenging the constitutionality of an Arizona statute exempting all members of a particular religious denomination – all Methodists, for example, or all Orthodox Jews – from paying State income taxes or any State taxes whatsoever. That plainly is not the law. As Justice O'Connor, joined by Justices Scalia and Thomas, wrote in concurrence to the *Coeur d'Alene* opinion, the Eleventh Amendment, under *Ex parte Young*, continues to call for "a straightforward inquiry into whether a complaint [against a state official] alleges an ongoing violation of federal law and seeks relief properly characterized as prospective . . . ." 521 U.S. at 295. There is no "tax policy" exception to this rule.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss for lack of subject-matter jurisdiction is without merit and should be denied in its entirety.

DATED this 11th day of April, 2000.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs, vs. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV 00-0287-PHX-EHC DEFENDANT'S REPLY TO RESPONSE TO MOTION TO DISMISS

Defendant Mark W. Killian, Director of the Arizona Department of Revenue ("Department"), replies as follows to Plaintiffs' Response to Defendant's Motion to Dismiss.

I. THE TAX INJUNCTION ACT AND THE PRINCIPLES OF COMITY UNDERLYING IT MUST BE BROADLY CONSTRUED.

Plaintiffs argue that their suit does not interfere with the State's ability to assess taxes because if they are successful the State will actually collect more money. This argument is unsupported by the language of the Act, the Supreme Court's interpretations of the Act, the principles of comity, and the rulings of the circuit courts that have addressed the issue.

First, Plaintiffs take an unduly narrow view of the language of the Act by arguing that it only applies to federal court rulings that would decrease State tax collections. The Act provides that the district courts shall not "enjoin, suspend or restrain the assessment, levy or collection of any tax under state law." Congress plainly intended to broadly restrict federal court jurisdiction over state tax disputes. Plaintiffs apparently confuse an "assessment" of taxes with a "deficiency assessment" issued when a taxpayer has paid too little. "Assessment," however, has a broader meaning in the United States Code. Assessment is the act of determining tax liability, not sending a bill for underpayment. 26 U.S.C. § 6201(a)(1) (Secretary shall assess all taxes shown on tax returns).[1] Thus, an injunction that orders the Department

[1] *See also Arashiro v. U.S.*, 94-2 USTC ¶ 50,419 (D.Haw. 1994) (United States properly assessed taxes shown on return because "when a tax return showing a tax liability and enclosing a payment is filed, no notice of deficiency is required); *IBEW Local Union No. 640 v. Forman*, 95-2 USTC ¶ 50,601, p. 99,000 (D.Ariz. 1995) (Rosenblatt, J.) ("the IRS was not required to issue a notice of deficiency . . . because the IRS is authorized by 26 U.S.C. § 6201(a)(1) to assess tax liabilities based on

(Continued on following page)

to disallow tax credits actually enjoins the Department from "assessing" the tax due under state law and is prohibited by the Tax Injunction Act.

Second, the Supreme Court has consistently rejected Plaintiffs' narrow interpretation of the Tax Injunction Act. For example, the Act does not prohibit declaratory judgments, but the Court has held that such relief is barred. *California v. Grace Brethren Church*, 457 U.S. 393 (1982). As the Court explained:

> Because the declaratory judgment "procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," the very language of the Act suggests that a federal court is prohibited from issuing declaratory relief in state tax cases. Additionally, because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes."

Id. at 408-09 (footnote and citations omitted). Plaintiffs' narrow interpretation of the Tax Injunction Act is simply not the law.

liabilities reported in the joint returns . . . without resort to the deficiency assessment procedure").

Third, even if the language of the Act does not apply to this particular case, longstanding principles of comity require federal courts to leave disputes about state taxes to state courts. *National Private Truck Council*, 515 U.S. 589, 590 (1995) ("[T]he Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation."); *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 110 (1981) ("[T]he principle of comity which predated the Act was not restricted by its passage."). In *Fair Assessment*, the Supreme Court went on to find that "the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Id.* at 114. The specific relief requested is not controlling.

Fourth, the circuit court decisions Plaintiffs rely upon are not on point, and the circuits that have addressed this issue have held that the Tax Injunction Act applies even when the requested relief would increase state tax collections. *Hoochuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), cited by Plaintiffs in their Response at 4, found the Tax Injunction Act did not apply because the suit was a challenge to how the State of Hawaii spent money, not a challenge to a state tax. *Id.* at 1177 ("[T]he requested relief is directed at a *spending* program of the State of Hawaii. We know of no case which has applied the Act to limit federal court jurisdiction to enjoin state revenue spending." (emphasis in original)). Similarly, *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975) was a challenge to Vermont's statute that revoked a person's right to operate a motor vehicle if the person was in default of an obligation of pay the State tax on motor vehicle purchase and use. The action was not a challenge to the tax itself.

Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969) applied only the literal language of the Act, contrary to the requirements of more recent Supreme Court decisions. In any event, the case was actually a challenge to limits on state spending that would be triggered if a county imposed taxes at too high a level. The validity of the tax itself was not at issue. Moreover, the appeal was expressly limited to the issue of whether the case should properly be heard by a single district judge or by a three-judge panel. As such, the court of appeals specifically stated that its "holding here in no way intimates an opinion upon the question of whether the federal courts, in the exercise of their discretion, should take jurisdiction of this claim." *Id.* at 327.

The language from *Dunn v. Casey*, 808 F.2d 555 (7th Cir. 1986), quoted by Plaintiffs in their Response at 5, n.2, may be disregarded as dicta. As the court notes, the "district judge was not requested in this case to interfere with the collection of a tax; he was asked to interfere with the conduct of litigation." *Id.* at 557. Here, however, this Court is being asked to directly decide how Arizona taxes should be calculated and assessed.[2]

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[2] *Rojas v. Fitch*, 928 F.Supp. 155 (D.R.I. 1996), cited by Plaintiffs at page 4 of their Response, appears to be on point, but it should not be relied upon because the Tax Injunction Act issue was not addressed on appeal. Indeed, the First Circuit expressly declined to address the issue and affirmed on the merits in order to avoid, in its words, a jurisdictional quandry. *Rojas v. Fitch*, 127 F.3d 184, 187 (1st Cir. 1997). In any event, as discussed below, the First Circuit has rejected the argument that federal courts may hear tax disputes that result in orders to increase taxes. *United States Brewers Association, Inc. v. Perez*, 592 F.2d 1212 (1st Cir. 1979) (interpreting a federal statute

(Continued on following page)

The circuit courts that have addressed this issue have held that the Tax Injunction Act bars federal court jurisdiction even when the result of deciding a state tax dispute would be to increase taxes. In *In re Gillis*, 83 F.2d 1001 (6th Cir. 1988), the Sixth Circuit found that the Tax Injunction Act applied to an action where the plaintiffs sought an injunction ordering tax officials to assess all real and personal property owned by coal, oil, and gas interests at full fair cash value. The plaintiffs alleged that tax officials had violated their right to equal protection by assessing other taxpayers at less than full fair cash value, while plaintiffs were taxed at full value. In other words, the plaintiffs sought to have the court order the state officials to tax other taxpayers more. The plaintiffs argued that the Tax Injunction Act did not apply because their requested relief would enhance, not restrain, the collection of taxes. *Id.* at 1007-08. The circuit court rejected this narrow construction. The court instead focused on the underlying policy that federal courts should not decide state tax issues.

> [W]hile ultimately respondents claim they seek to force the collection of additional taxes, the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax; and the expense to the state in defending the action is identical. . . . [I]t is noteworthy that the district court would be forced to issue a declaratory judgment finding that virtually all property owners in the state of Kentucky had been

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applicable to Puerto Rico that contains essentially the same language as the Tax Injunction Act).

> deprived of their right to equal protection. . . . While respondents insist that such a ruling would work no damage to the fiscal system of the state – since the remedy would be reassessment of those who have been underassessed, rather than refunds to respondents – we cannot logically conclude that no harm would result from a ruling that property assessments have been unconstitutionally administered for years.

Id. at 1008. The same can be said in this case. Striking down an Arizona tax credit available to hundreds of thousands of Arizona taxpayers, and leaving their tax liability uncertain until the case is finally decided, would also have serious negative consequences on the administration of the Arizona income tax.

Similarly, in *United States Brewers Association, Inc. v. Perez*, 592 F.2d 1212 (1st Cir. 1979), the First Circuit found that a federal anti-tax injunction statute applicable to Puerto Rico, which contains essentially the same language as the Tax Injunction Act, applies to a case where the relief sought was an order that some taxpayers be taxed more. The court concluded: "[A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations." *Id.* at 1215.

Finally, neither *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), nor *Mueller v. Allen*, 463 U.S. 380 (1983), support Plaintiffs' position. The Tax Injunction Act was not at issue in either case. As Judge Friendly stated in one of the cases Plaintiffs cite in their Response: "[P]laintiff derives no benefit from [a Supreme

Court case] invalidating Virginia's poll tax, since the defendants in that case had not raised the issue of the applicability of the state tax injunction act, and neither the majority nor the minority opinion advert to it." *Wells v. Malloy*, 510 F.2d 74, 76-77 (2nd Cir. 1975). In any event, if the Tax Injunction Act had been raised in *Nyquist* and *Mueller*, the United States Supreme Court could still have decided the issues, through appeals from the state courts. The Tax Injunction Act does not leave claimants without a remedy; it merely requires that claims be heard in state courts.

In summary, Plaintiffs' argument is not supported by either the language or the spirit of the Tax Injunction Act. The Act, and the principles of comity that underlie it, require that this action be dismissed. Plaintiffs are asking this Court to consider the constitutionality of a portion of Arizona's income tax and order the State to assess taxes in a particular manner. This Court should refuse to accept jurisdiction.

II. THE ELEVENTH AMENDMENT BARS THIS ACTION.

Plaintiffs express disbelief that the Eleventh Amendment could bar them from having their case heard in federal court. Nevertheless, the purpose and policy of the Eleventh Amendment is to do just that. There is no question that Plaintiffs cannot sue the State of Arizona or the Department of Revenue. Their attempt to avoid Eleventh Amendment immunity by suing the Director of the Department fails because this action is the functional equivalent of a suit against the State and it implicates

special sovereignty interests of the State given special protection by Congress and the Supreme Court.[3]

The Ninth Circuit has stated that "[t]he four circumstances in which . . . declaratory and injunctive relief actions against individual state officials have been allowed to proceed in federal court are when (1) state officials are plainly acting outside their statutory authority, (2) no state forum exists to vindicate federal interests, (3) it is necessary to permit the federal courts to vindicate federal rights, and (4) a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law." *Yakama Indian Nation v. State of Washington Dep't of Revenue*, 176 F.3d 1241 (9th Cir. 1999) (citations and internal quotation marks omitted). It is plain that reasons one through three do not apply here. The Department is recognizing tax credits clearly allowed by State statute and any federal rights or interests may be pursued in the Arizona courts, as shown by the Arizona Supreme Court's decision in *Kotterman*.

Plaintiffs rely on reason four, but as the Supreme Court held in both *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Idaho v. Coeur d'Alene Tribe of*

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[3] Federal law consistently recognizes that the remedies available in tax cases are narrower than those available in non-tax cases. *U.S. v. Brockamp*, 519 U.S. 347 (1997) (courts will not apply equitable principles to tax cases even when they might apply to other types of cases); *National Private Truck Council*, 515 U.S. at 588 (Section 1983 actions challenging taxes may not be brought in state courts, although state courts must entertain non-tax cases under that statute); *Fair Assessment*, 454 U.S. at 104 (barring federal courts from hearing section 1983 challenges to state taxes, although non-tax cases are allowed).

Idaho, 521 U.S. 261 (1997), a plaintiff cannot overcome Eleventh Amendment immunity by merely seeking injunctive relief against state officers. As the Court stated in *Coeur d'Alene*:

> The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

521 U.S. at 270.[4]

Congress and the Supreme Court have repeatedly expressed a policy that state tax disputes be decided in state courts. There might be good reason to apply the *Ex parte Young* exception to the Eleventh Amendment even in tax cases if state tax officials were ignoring well-established federal law, or state courts were not open to taxpayers. As the *Kotterman* case shows, however, neither of those factors exists here. Therefore, Plaintiffs' claims are barred because they implicate Arizona's special sovereignty interests in its own tax sysyem. *See ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1193 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 904 (1999) ("We do not doubt, therefore, that a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite

[4] The quoted language is from Section II.A of the *Coeur d'Alene* opinion, which was joined by five justices.

the lack of any ownership of land, *cf. Coeur d'Alene Tribe*, 117 S.Ct. at 2041, it is impossible to imagine a state government could continue to exist without the power to tax.").

Moreover, Plaintiffs complaint goes beyond a simple request for prospective relief. They seek an order prohibiting the Department from allowing the tax credit to be used. Complaint at 7. Does this mean that the Department will have to disallow all such credits as it examines returns in its normal audit process, even credits claimed for contributions made before any injunction is issued (for example, in 1998, 1999 or early 2000)? Must the Department examine each tax return for prior years and disallow any claimed credits? If a taxpayer has carryover credits from earlier years, must they be disallowed? These questions show that the requested relief is not, and cannot be, just prospective, but is intended to reach prior tax years and past actions of taxpayers.[5]

For the reasons stated above, and in the Motion to Dismiss, this action should be dismissed because it is barred by the Eleventh Amendment.

[5] Plaintiffs also request that the Department be ordered to inform all School Tuition Organizations that "all funds in their possession as of the date of this Court's order must be paid into the state general fund." Complaint at 7-8. While it is doubtful that the Court can determine the legal status of funds held by organizations that are not parties to this action, this request highlights the fact that Plaintiffs are actually seeking both past and future relief.

CONCLUSION

The Tax Injunction Act and the Eleventh Amendment deprive this Court of subject matter jurisdiction over this action. Therefore, the Complaint should be dismissed.

RESPECTFULLY SUBMITTED this 20th day of April, 2000.

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Arizona Attorney General

PATRICK IRVINE
Assistant Attorney General

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer, Plaintiff-Appellants, vs. J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue, Defendant-Appellee.	No. 01-15901 DC No. CIV 00-0287 EHC Arizona (Phoenix) **Motion for Clarification**

Defendant-Appellant J. Elliott Hibbs,[1] the Director of the Department of Revenue (the "Director") moves this Court to clarify that by its Orders recalling the mandate in this matter and directing the parties to file supplemental briefs, it intended to suspend the finality of the panel's judgment pending its further determination whether to hear this matter en banc.

The panel issued its opinion and judgment on October 3, 2002. Neither party filed a petition for rehearing, and on October 25, 2002, the Court issued its mandate. On October 28, 2002, the Court recalled its mandate and, on November 13, 2002, directed the parties to file simultaneous briefs setting forth their respective positions on whether the Court should hear this case en banc.

The Court's actions are consistent with its General Orders and reflect the Court's decision to suspend the finality of the judgment until the Court either determines not to rehear the matter en banc or issues its en banc decision. Pursuant to General Order (GO) 5.4(c)(3), any judge may sua sponte call for a vote on rehearing en banc within seven days of the expiration of the time for filing a petition for panel rehearing. After receiving a timely sua sponte en banc call, the author of the panel opinion ordinarily enters an order directing parties to file simultaneous briefs within twenty-one days setting forth their respective positions on whether the Court should rehear the matter en banc. *Id.* Pursuant to GO 5.4 (d), if a sua

[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, J. Elliott Hibbs, the current director of the Arizona Department of Revenue is automatically substituted for Mark W. Killian, the former director.

sponte call is made in a case in which no petition for rehearing en banc or panel rehearing has been filed, the judge who makes the call shall direct the Clerk of the Court to stay the mandate and notify the panel.

Here, the Clerk's Office issued the mandate mistakenly and corrected its error within three days by recalling it.[2] The courts of appeal have an inherent power to recall their mandates. *Hawaii Housing Auth. v. Midkiff*, 463 U.S. 1323, 1324, 104 S. Ct. 7, 8 (1983). The Court did not abuse its discretion in recalling the mandate to correct a clerical or administrative error. *See Lamb v. Farmers Ins. Co.*, 586 F.2d 96 (8th Cir. 1978); 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 3938 at 720 (2d ed. 1996) ("A miscellaneous variety of other missteps by court or parties have been corrected in circumstance that do not threaten the central values of repose. . . .").

The Court's actions, *i.e.*, recalling the mandate and ordering simultaneous briefing on whether to hear the matter en banc, indicated its intent to suspend the finality of the judgment in this case pending its determination of the sua sponte en banc call. *See Young v. Harper,* 520 U.S. 143, 147 n.1, 117 S. Ct. 1148, 1151 n.1 (1997) (recognizing that a petition for certiorari was timely filed because the court extended the time for filing the rehearing petition

[2] Appellants assume that the sua sponte en banc call was untimely. *See* Appellants' Supplemental Brief Regarding Rehearing en Banc at 1-3 n.3. However, it may have been that the call was made within the twenty-one day deadline but the Clerk's Office issued the mandate in error. Moreover, GO 5.1(b)(2) gives the en banc coordinator the authority to extend, suspend, or compress the time schedules in the En Banc Procedures Chapter for good cause.

and no mandate issued until after the petition was denied); *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S. Ct. 1651, 1660 (1990) (recognizing the Supreme Court's consistent practice "to treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing"). Although neither party filed a petition for rehearing within fourteen days, the Court's internal procedures allowing for a sua sponte en banc call and ordering simultaneous briefing in effect extend the time for considering rehearing petitions and suspend the finality of the judgment. In fact, the Director's counsel understood that the Court's actions suspended the finality of the judgment and therefore did not file a petition for certiorari within ninety days of the judgment.

CONCLUSION

For the foregoing reasons, the Director respectfully requests the Court to clarify that its Orders recalling the mandate and directing the parties to file simultaneous briefs suspended the finality of the judgment.

Dated this 17th day of January, 2003.

Paula S. Bickett
Chief Counsel, Civil Appeals
Attorneys for Defendant-Appellee

Original and 4 copies of the foregoing
mailed this 17th day of January, 2003
via Federal Express to:

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Attorneys for Plaintiffs-Appellants

by_____

140 Resident Personal Income Tax Return 2000

Or fiscal tax year beginning _____, 2000, and ending _____, 2001. 66

Your first name and initial 1	Last name	Your social security number
If a joint return, spouse's first name and initial 1	Last name	Spouse's social security number
Present home address - number and street, rural route 2 / Apt. No.	Daytime telephone ( )	IMPORTANT! You must enter your SSN(s) above.
City, town or post office / State / ZIP code 3	Home telephone 94 ( )	For DOR use only

Filing Status

4		Married filing joint return
5		Head of household - name of qualifying child or dependent :
6		Married filing separate return. Enter spouse's social security number above and full name here. ➤
7		Single

Exemptions

8		Age 65 or over (you and/or spouse)	*Enter the number claimed. Do not put a check mark.*
9		Blind (you and/or spouse)	
10		Dependents. *From page 2, line A2 - **do not include self or spouse.***	
11		Qualifying parents and ancestors of your parents. *From page 2, line A5.*	

88

81 80

82 CHECK ONE if filing under a federal extension: 4 month federal extension 82 D ☐ 6 month federal extension 82 F ☐

12	Federal adjusted gross income (from your federal return)	12	00
13	Additions to income *(from page 2, line B12)*	13	00
14	Add lines 12 and 13	14	00
15	Elective subtraction of 2000 federal retirement contributions. *See instructions*	15	00
16	Subtractions from income *(from page 2, line C17 or line C28)*	16	00
17	Total subtractions. *Add line 15 and line 16*	17	00
18	Arizona adjusted gross income. *Subtract line 17 from line 14*	18	00
19	**Deductions. *Check box and enter amount.*** *See instructions, page 12.* 19 1 ☐ ITEMIZED 19 5 ☐ STANDARD	19	00
20	Personal exemptions. *See page 12 of the instructions*	20	00
21	Arizona taxable income. *Subtract lines 19 and 20 from line 18*	21	00
22	Compute the tax using amount on line 21 and Tax Rate Table X, Y or Optional Tax Rate Tables	22	00
23	Tax from recapture of credits from Arizona Form 301, line 30	23	00
24	Subtotal of tax. *Add lines 22 and 23*	24	00
25	Clean Elections Fund Tax Reduction. *See instructions, page 13.* 25 1 ☐ YOURSELF 25 2 ☐ SPOUSE	26	00
26	Tax reduction. *Complete worksheet on page 13 of the instructions*	27	00
27	Reduced tax. *Subtract line 26 from line 24*	28	00
28	Family income tax credit from worksheet on page 14 of instructions	29	00
29	Credits from Arizona Form 301, line 56	31	00
30	Credit type. *Enter form number of each credit claimed* 30 [3] [3] [3] [3]	32	00
31	*Subtract lines 28 and 29 from line 27. If lines 28 and 29 are more than line 27, enter zero.*	33	00
32	Clean Elections Fund Tax Credit. *From worksheet on page 16*	34	00
33	Balance of tax. *Subtract line 32 from line 31. If line 32 is more than line 31, enter zero.*	35	00
34	Arizona income tax withheld during 2000	36	00
35	Arizona estimated tax payments for 2000	37	00
36	Amount paid with 2000 Arizona extension request (Form 204)	38	00
37	Property tax credit. Attach Arizona Form 140PTC and enter amount claimed	39	00
38	Other refundable credits *check box(es) and enter amount(s)* 38 A1 ☐ 313 38 A2 ☐ 326 38 A3 ☐ 327	40	00
39	Total payments/refundable credits. *Add lines 34 through 38*	41	00
40	**TAX DUE.** *If line 33 is larger than line 39, subtract line 39 from line 33 and enter amount of tax due. Skip lines 41, 42 and 43*	42	00
41	**OVERPAYMENT.** *If line 39 is larger than line 33, subtract line 33 from line 39 and enter amount of overpayment*	43	00
42	Amount of line 41 to be applied to 2001 estimated tax		
43	Balance of overpayment. *Subtract line 42 from line 41*		

Voluntary gifts to:

Aid to Education Fund (Enter entire refund only)	44	00	Arizona Wildlife Fund	45	00
Citizens Clean Elections Fund	46	00	Child Abuse Prevention Fund	47	00
Domestic Violence Shelter Fund	48	00	Neighbors Helping Neighbors Fund	49	00
Special Olympics Fund	50	00	Political Gift	51	00

52 Check only one if making a political gift: 52 1 ☐ Democratic 52 2 ☐ Green 52 3 ☐ Libertarian 52 4 ☐ Natural Law 52 5 ☐ Reform 52 6 ☐ Republican

53	Estimated payment penalty and interest and MSA withdrawal penalty	53	00
54	Check applicable box(es). 54 1 ☐ Annualized/Other 54 2 ☐ Farmer or fisherman 54 3 ☐ Form 221 attached 54 4 ☐ MSA Penalty		
55	Total of lines 44, 45, 46, 47, 48, 49, 50, 51, and 53	55	00
56	**REFUND.** *Subtract line 55 from line 43. If less than zero, enter amount owed on line 57*	56	00
57	**AMOUNT OWED.** *Add lines 40 and 55. Include SSN on payment* Make Checks Payable To: Arizona Department of Revenue	57	00

If itemizing be sure you attach your federal Sch. A and Arizona Sch. A if required.

Attach payment here.

ESTIMATED TAX

ADOR 06-0011 (00)

PART A Dependents

Do not list yourself or spouse.

A1 List children and other dependents. If more space is needed, attach a separate sheet.

First name	Last name	Social security number	Relationship	No. of months lived in your home in 2000

A2 Enter total number of persons listed in A1 here and on the front of this form, box 10. TOTAL **A2**

A3 Enter the names of the dependents age 65 or over listed above who do not qualify as your dependent on your federal return:

A4 List qualifying parents and ancestors of your parents. If more space is needed, attach a separate sheet. You cannot list the same person here and also on line A1. For information on who is a qualifying parent or ancestor of your parents, see page 5 of the instructions.

First name	Last name	Social security number	Relationship	No. of months lived in your home in 2000

A5 Enter total number of persons listed in A4 here and on the front of this form, box 11. TOTAL **A5**

PART B Additions to income

B6	Non-Arizona municipal interest	**B6**	00
B7	Early withdrawal of Arizona Retirement System contributions not included on your federal return	**B7**	00
B8	Ordinary income portion of lump-sum distributions excluded on your federal return	**B8**	00
B9	Agricultural water conservation expenses	**B9**	00
B10	Medical savings account (MSA) distributions. *See page 6 of the instructions*	**B10**	00
B11	Other additions to income. *See instructions and attach your own schedule*	**B11**	00
B12	Total. *Add lines B6 through B11. Enter here and on the front of this form, line 13*	**B12**	00

PART C Subtractions from income

C13	Exemption: Age 65 or over. *Multiply the number in box 8, page 1, by $2,100*	**C13**	00		
C14	Exemption: Blind. *Multiply the number in box 9, page 1, by $1,500*	**C14**	00		
C15	Exemption: Dependents. *Multiply the number in box 10, page 1, by $2,300*	**C15**	00		
C16	Exemption: Qualifying parents and ancestors of your parents. *Multiply the number in box 11, page 1, by $10,000*	**C16**	00		
C17	Total exemptions. Add lines C13 through C16. ***If you have no other subtractions from income, skip lines C18 through C28 and enter the amount on line C17 onto Form 140, page 1, line 16***			**C17**	00
C18	Interest on U.S. obligations such as U.S. savings bonds and treasury bills			**C18**	00
C19	Exclusion for federal, Arizona state or local government pensions (up to $2,500 per taxpayer)			**C19**	00
C20	Arizona state lottery winnings included as income on your federal return (up to $5,000 only)			**C20**	00
C21	U.S. social security or Railroad Retirement Act benefits included as income on your federal return			**C21**	00
C22	Agricultural crops contributed to Arizona charitable organizations			**C22**	00
C23	Alternative fuel vehicles and refueling equipment			**C23**	00
C24	Certain wages of Native Americans			**C24**	00
C25	Income tax refund from other states. See instructions			**C25**	00
C26	Deposits and employer contributions into MSAs. See page 9 of the instructions			**C26**	00
C27	Other subtractions from income. See instructions and attach your own schedule			**C27**	00
C28	Total. Add lines C17 through C27. Enter here and on the front of this form, line 16			**C28**	00

PART D

D29 Last name(s) used in prior years if different from name(s) used in current year.

Attach W-2 here.

Please Sign Here

I have read this return and any attachments with it. Under penalties of perjury, I declare that to the best of my knowledge and belief, they are true, correct and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Occupation
Spouse's signature	Date	Spouse's occupation

Paid Preparer's Information

Preparer's signature		Firm's name (preparer's if self-employed)
Preparer's TIN	Date	Preparer's address

If you are sending a payment with this return, use the green envelope, or mail to: Arizona Department of Revenue, PO Box 52016, Phoenix AZ 85072-2016.

If you are expecting a refund, or owe no tax, or owe tax but are not sending a payment, use the gold envelope, or mail to: Arizona Department of Revenue, PO Box 52138, Phoenix AZ 85072-2138.

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the Ninth Circuit err in holding, in conflict with the First, Fifth, Sixth, and Eleventh Circuits, that the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity that traditionally restrain federal judicial interference with state tax systems do not require district courts to dismiss constitutional challenges to state tax credits that directly impact the administration of a State's tax system?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 307 F.3d 1011 (9th Cir. 2002), and is reprinted at Petitioner's Appendix (Pet. App.) 11. The denial of rehearing en banc and Judge Kleinfeld's dissent from that denial, which was joined by Judge O'Scannlain, is reported at 321 F.3d 911 (9th Cir. 2003), and is reprinted at Pet. App. 1. The district court's unreported decision is reprinted at Pet. App. 27.

JURISDICTION

Respondents invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). The United States Court of Appeals for the Ninth Circuit issued its judgment and opinion on October 3, 2002. The Ninth Circuit denied the request for rehearing en banc on March 5, 2003. Petitioner filed the Petition for Writ of Certiorari on June 3, 2003. The Court granted certiorari on September 30, 2003, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Tax Injunction Act, 28 U.S.C. § 1341, provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." Section 43-1089, Arizona Revised Statutes (A.R.S.), allows Arizona taxpayers to reduce their state tax liability by claiming a credit for amounts they have already paid to a "school tuition

organization." The complete text of A.R.S. § 43-1089 is set forth at Pet. App. 37.

STATEMENT OF THE CASE

This case concerns whether the Tax Injunction Act and the principles of comity prohibit a federal district court from interfering with state income tax assessments by enjoining the Director of the Arizona Department of Revenue from allowing taxpayers to use a state tax credit. As this Court has recognized, the Tax Injunction Act "and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 103 (1981). That essential principle as codified in the Tax Injunction Act applies as surely to an injunction against the granting of a tax credit as it does to an injunction against the collection of state revenue.

The Ninth Circuit's contrary conclusion ignores the statutory language of the Tax Injunction Act, which bars restraints on the *assessment* of taxes in addition to the *collection* of taxes, and the Act's overriding federalism purpose. *See California v. Grace Brethren Church*, 457 U.S. 393, 409 n.22 (1982) ("the legislative history of the Tax Injunction Act demonstrates that Congress worried . . . about divesting the federal courts of jurisdiction to interfere with State tax administration"); *Fair Assessment*, 454 U.S. at 103. The Ninth Circuit's holding also conflicts with a long line of this Court's decisions that recognize the "dangers inherent in disrupting the administration of

state tax systems." *Grace Brethren*, 457 U.S. at 410 n.23 (citing *Dows v. City of Chicago*, 78 S. Ct. (11 Wall.) 108 (1871)).

The Ninth Circuit's unjustifiedly restricted construction of the Act and principles of comity will result in increased and duplicative federal court litigation involving all aspects of state tax administration despite plain, speedy, and adequate state court remedies. The history of the present dispute shows the extent of this unnecessary duplication. In 1999, two years after the enactment of A.R.S. § 43-1089, the Arizona Supreme Court decided the same issues raised by the Respondents in this case and this Court denied certiorari. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921, *cert. also denied in Rhodes v. Killian*, 528 U.S. 810 (1999). According to the Ninth Circuit, however, those same issues must now be relitigated in the federal courts. This Court should reverse the Ninth Circuit and clarify that the Tax Injunction Act and principles of comity preclude federal court interference with the administration of all phases of a State's tax system.

A. Statement of Facts.

In 1997, the Arizona Legislature enacted A.R.S. § 43-1089. Pet. App. 37. That statute allows taxpayers to reduce their state income tax liability by claiming a credit for amounts they have paid to a school tuition organization ("STO"). Specifically, the statute permits any person owing $500 or more in Arizona income taxes in any tax year to reduce state tax liability by up to $500 if a contribution is made to an STO. Pet. App. 28. The Arizona Legislature raised the maximum credit allowed for a married couple to $625 per year, effective January 1, 2001.

Pet. App. 12. STOs must use the donated funds to provide scholarships to students attending private elementary and secondary schools in Arizona and may provide scholarships to students attending religious schools. Pet. App. 12-13, 28.

Shortly after the Arizona Legislature enacted A.R.S. § 43-1089, several Arizona taxpayers brought an action directly in the Arizona Supreme Court challenging its constitutionality. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921, *cert. also denied in Rhodes v. Killian*, 528 U.S. 810 (1999). Like Respondents here, the *Kotterman* plaintiffs alleged that A.R.S. § 43-1089 violated the Establishment Clause; they also alleged that the statute violated the Arizona Constitution. *Id.* at 610. The Arizona Supreme Court held that A.R.S. § 43-1089 did not violate the Establishment Clause. *Id.* at 616.

B. Proceedings Below.

Respondents are Arizona taxpayers who allege that A.R.S. § 43-1089 violates the First and the Fourteenth Amendments of the United States Constitution because it authorizes the use of funds raised through state taxation to provide direct support for religious education. Pet. App. 13, 29. Respondents brought suit in the United States District Court for the District of Arizona against J. Elliott Hibbs, in his official capacity as Director of the Arizona Department of Revenue ("State").[1]

[1] J. Elliott Hibbs became the Director of the Arizona Department of Revenue on January 6, 2003, replacing Mark W. Killian, the original Defendant in this action. Accordingly, Hibbs has been substituted as a party pursuant to Supreme Court Rule 35.3.

Respondents request a declaration that A.R.S. § 43-1089, on its face and as applied, violates the Establishment Clause and an injunction that

> prohibit[s] defendant from allowing taxpayers to utilize the tax credit authorized by A.R.S. § 43-1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion.
>
> . . . .
>
> . . . order[s] that Defendant [Hibbs] inform all STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion, that all funds in their possession as of the date of this Court's order must be paid into the state general fund.

Joint App. at 15.

The district court granted the State's Motion to Dismiss on the grounds that it had no subject-matter jurisdiction to hear the matter under the Tax Injunction Act. Pet. App. 12, 36. The court found persuasive the Sixth Circuit's interpretation of the Act in *In re Gillis*, 836 F.2d 1001, 1005 (6th Cir. 1988), and held that the jurisdictional bar imposed by the Act was not limited to lawsuits that challenge the collection of taxes. Pet. App. 31. The court also held that even "[a]ssuming the tax credits are not covered by the specific language of the Act, the underlying principles of comity and equitable restraint that are

embodied in the [Act] prevent this Court from exercising jurisdiction over the action." Pet. App. 34 (citing *Fair Assessment*, 454 U.S. at 108, and *Gillis*, 836 F.2d at 1005).

On appeal, the Ninth Circuit reversed, holding that neither the Tax Injunction Act nor the principles of comity bar Respondents' challenge to Arizona's tax credit. Pet. App. 26. With respect to the Act, which bars district court interference with the "assessment, levy or collection" of any state tax, the Ninth Circuit concluded that a determination of tax liability made after taking account of a tax credit does not constitute an "assessment" within the meaning of the Act. In reaching that decision, the court rejected both relevant dictionary definitions and ordinary understandings of the word "assessment." Instead, the Ninth Circuit narrowly defined "assessment" to cover only those tax calculations made in the course of determining "gross" income, and not those made "after a taxpayer's gross income has been determined" but before the taxpayer's ultimate liability is established. Pet. App. 16. The court also held that the Respondents' suit was not barred by the principles of comity. According to the Ninth Circuit, those principles apply only to federal court relief that would interfere with the State's ability to *collect* a tax, and not to injunctions that affect state tax administration more generally. Pet. App. 23-26.

In accordance with the Ninth Circuit's sua sponte order dated November 12, 2002, the parties filed supplemental briefs addressing whether the Ninth Circuit should rehear the case en banc. *Id.* In a published order dated March 5, 2003, the court declined to rehear the case en banc. Pet. App. 1. Judge Kleinfeld dissented from the denial and Judge O'Scannlain joined. Pet. App. 2.

In his dissent, Judge Kleinfeld disagreed with the panel's narrow definition of the term "assessment" in the Tax Injunction Act and instead defined it as the process of calculating a person's final tax bill after all deductions and credits are accounted for. In support, Judge Kleinfeld pointed to definitions of "assessment" in the Internal Revenue Code, lay dictionaries, tax treatises, and law dictionaries. Pet. App. 3-4. Under the proper definition of assessment, Judge Kleinfeld reasoned, "the Tax Injunction Act deprives the federal courts of jurisdiction to enjoin states from granting tax credits as part of the calculation due." Pet. App. 5. Judge Kleinfeld also determined that the principles of comity necessitated overturning the panel's decision. Pet. App. 6. He found that, under this doctrine, "federal district courts are required to dismiss claims asserting challenges to state tax systems, whether they are constitutional or not, and whether they are technically within the Tax Injunction Act's ban or not, so long as there is an adequate state remedy available." Pet. App. 7.

SUMMARY OF ARGUMENT

This case involves an issue of federalism that is critical to the cooperative relationship between the federal courts and state governments. The question presented here, which involves the extent of the federal courts' jurisdiction over litigation that interferes with state tax systems, goes to the core principles of state sovereignty. Respondents' federal court lawsuit, an Establishment Clause challenge to an Arizona tax credit, is barred by the plain language of the Tax Injunction Act, which is consistent with the broad federalism purpose of the Act. Respondents' lawsuit is also barred by the principles of comity

because Respondents request injunctive and declaratory relief that would interfere with Arizona's administration of its taxes.

A. The Tax Injunction Act prohibits federal district courts from "enjoin[ing], suspend[ing], or restrain[ing] the assessment, levy or collection of any tax under state law" where there is a "plain, speedy and efficient remedy" in the state courts. 28 U.S.C. § 1341. Respondents' lawsuit, which seeks an injunction against implementation of certain state tax credits, is barred because it would interfere with the "assessment" of taxes. The ordinary meaning of "assessment" is the process of calculating a person's final tax bill after all deductions and credits are accounted for." Pet. App. 3 (Kleinfeld, J., dissenting). This meaning fits in the context of the Act's broad language, which follows "assessment" with "levy" and "collection" to encompass every stage of the state tax system. This meaning is also consistent with Congress's use of the term in the Internal Revenue Code and the Court's understanding of that term. The plain language of the statute is clear, and enough to dispose of this case: Respondents may not proceed in federal court because their challenge interferes with the "assessment" of state taxes.

B. The Tax Injunction Act's broad federalism purpose is entirely consistent with the straightforward text of the statute. This Court has consistently recognized that, when it enacted the Tax Injunction Act, Congress was concerned generally about federal-court intervention in the States' core sovereign function of taxation. Thus, the prohibition is worded broadly to encompass all phases of the state tax system, and to prevent not only federal-court interference with state revenue collection but also interference with

state officials' ability to do their duties and state courts' responsibility to interpret state tax laws.

Instead of heeding this broad federalism purpose, the Ninth Circuit jealously guarded its jurisdiction by finding that Respondents' lawsuit was not barred by the Tax Injunction Act because Congress intended only to prohibit federal-court litigation that would have an adverse effect on state tax collection. This holding cannot be squared with the statutory language or the legislative history, and it directly disregards this Court's admonition in *Arkansas v. Farm Credit Service*: "Given the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." 520 U.S. 821, 827 (1997).

C. Respondents' lawsuit is also barred by the principles of comity that have traditionally restrained the federal courts from exercising their equitable powers in state tax cases where the state law affords adequate relief. Both before and after the enactment of the Tax Injunction Act, the Court has applied the principles of comity expansively to avoid disruption of state tax administration, which is an area of particular state concern. Respondents' lawsuit requests both declaratory and injunctive relief that would significantly disrupt Arizona's tax administration if granted. If the district court were to enjoin the State from allowing taxpayers to use the tax credit, the State would be unable to determine the liability of thousands of Arizona taxpayers with certainty until this case is finally resolved. Moreover, invalidating the Arizona tax credit and enjoining its use would result in inconsistent judgments between the federal court and the Arizona

Supreme Court – precisely the type of harm that the principles of comity are designed to prevent. In finding that comity did not bar the district court's jurisdiction, the Ninth Circuit ignored "the fundamental principle of comity between federal court and state governments that is essential to 'Our Federalism.'" *Fair Assessment*, 454 U.S. at 103. By itself, that is a sufficient and alternative ground for reversing the Ninth Circuit's decision.

ARGUMENT

RESPONDENTS' FEDERAL-COURT LAWSUIT CHALLENGING ARIZONA'S TAX CREDIT IS BARRED BY THE TAX INJUNCTION ACT AND PRINCIPLES OF COMITY.

A. Respondents' Lawsuit Challenging Arizona's Tax Credit Is Barred by the Plain Language of the Tax Injunction Act.

The Tax Injunction Act prohibits federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection" of any state tax as long as there is a "plain, speedy and efficient remedy in state court." 28 U.S.C. § 1341. The question in this case is whether an injunction against implementation of a tax credit interferes with an "assessment" under the Act.[2] The

[2] Respondents in this case have never argued that the state law remedy available to them was inadequate. Indeed, the Arizona Supreme Court decided the exact issues raised here shortly after the Arizona Legislature enacted the tax credit in A.R.S. § 43-1089. *Kotterman*, 972 P.2d at 610.

Ninth Circuit concluded that the term "assessment" reaches only the calculation of *gross* income on a tax form, but not the application of a tax *credit* to determine bottom-line tax liability. But that strained definition ignores the ordinary meaning of "assessment" that fits within the context of the Act's language and the common understanding of "assessment" in federal and state precedent. Respondents' lawsuit requests relief that interferes with the assessment of state income taxes and is therefore prohibited by the Tax Injunction Act.

1. In statutory construction cases, this Court first determines "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (internal quotations omitted); *see also Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981). ("The starting point of our inquiry is the plain language of the statute itself.") "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart*, 534 U.S. at 450 (internal quotations omitted). Here, the ordinary and plain meaning of the word "assessment" is reinforced by its statutory context. There is no reason for the Court to go beyond the plain language of the statute.

Because "assessment" is not defined in the Act, it should be construed in accordance with its ordinary meaning and in light of the terms that surround it. *Smith v. United States*, 508 U.S. 223, 226 (1993). In ordinary usage, an "assessment" is "the process of calculating a person's final tax bill after all deductions and credits are

accounted for." Pet. App. 4 (Kleinfeld, J., dissenting); *see also ACLU Found. v. Bridges*, 334 F.3d 416, 422 (5th Cir. 2003) (defining "assessment" as "the entire plan or scheme fixed upon for charging or taxing"). Put even more simply, a "tax assessment" is a tax *bill*: the final amount owed to the government. Under that ordinary and sensible understanding of the word "assessment," a federal court challenge to a state tax credit – a component of a taxpayer's ultimate liability – is barred by the plain terms of the Tax Injunction Act.

Dictionary definitions of "assessment" support this common-sense interpretation. Current dictionary definitions of "assessment" include "the entire plan or scheme fixed upon for charging or taxing" and "the act of assessing: the act of apportioning or determining an amount to be paid," *Webster's Third New International Dictionary* 131 (1981) – both of which correspond to the ordinary understanding that "assessment" refers to a taxpayer's bottom-line liability to the state. Dictionaries available in 1937, when Congress enacted the Tax Injunction Act, are to the same effect. For example, *Webster's New International Dictionary of the English Language* defines "assessment" as the "act of apportioning or determining an amount or amount to be paid"; "[t]he entire plan or scheme fixed upon for charging or taxing." 166 (2d ed. 1934).[3]

[3] In *Rosewell*, 450 U.S. at 516, the Court relied on the same dictionary to determine the meaning of the words "plain," "speedy," "efficient," and "remedy," as used in the Act.

When the word "assessment" is read together with the terms that surround it, it becomes even more clear that "assessment" refers to the final determination of tax liability. First, the context eliminates one dictionary definition upon which the Ninth Circuit relied: "to estimate officially the value of (property, income, etc.) as a basis for taxation." Pet. App. 16 (quoting *Random House Dictionary of the English Language* 90 (1979)). That definition does not fit with the surrounding words of the Act. The Act does not contain the word "property"; property is not the subject of the term "assessment" in the provision. Second, defining "assessment" as the determination of the amount to be paid also fits with the words "levy" and "collection" in the Act. When viewed together, it is clear that the three terms are intended to encompass all three of the major parts of the state taxation system: the "assessment" (the determination of the tax) is first, followed by the "levy" (the imposition of the tax), followed by the "collection" (obtaining payment of the tax). In short, the statutory context only confirms that "assessment" should be construed according to its ordinary meaning as a final determination of tax liability.

This common-sense construction of "assessment" is also supported by Congress's use of the term in the Internal Revenue Code. In the Code, Congress uses the word "assessment" to refer to the ultimate tax liability of a taxpayer – that is, "how much money the taxpayer owes to the government in taxes, after consideration of any credits as well as deductions." Pet. App. 5 (Kleinfeld, J., dissenting); *see, e.g.*, 26 U.S.C. § 6201(a)(1) ("[t]he Secretary shall 'assess' all taxes" shown on tax returns); 26 U.S.C. § 6203 ("assessment shall be made by recording the liability of the taxpayer"). As Judge Kleinfeld correctly concluded,

"[t]here is no reason to think that Congress meant something narrower in the Tax Injunction Act than it did in the Internal Revenue Code." Pet. App. 5.

Finally, this Court itself has used and understood the term "assessment" to mean the determination of tax liability. For example, in *United States v. Fior D'Italia, Inc.*, the Court stated that "[a]n assessment amounts to an IRS *determination* that a taxpayer owes the Federal Government a certain amount of unpaid taxes." 536 U.S. 238, 242 (2002) (emphasis added). The Court then held that the provision of the Internal Revenue Code that grants the IRS assessment authority "must simultaneously grant the IRS power to decide *how* to make that assessment." *Id.* at 243; *cf. New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988) (state action in allowing tax credit directly concerns State's "assessment and computation of taxes").

2. The Ninth Circuit simply ignored most of this evidence in the course of concluding that the term "assessment" in the Tax Injunction Act refers to the calculation of *gross* taxable income but not to "below-the-line" calculations of total tax liability. That narrow and strained definition of "assessment" is contrary to common usage, inconsistent with the Ninth Circuit's own understanding of the purpose of the Act, and irreconcilable with Arizona's own system for calculating state taxes.

The Ninth Circuit rests its entire statutory analysis on one selective quotation from a dictionary, defining "assess" as "(1) 'to estimate officially the value of (property, income, etc.) as a basis for taxation,' and (2) 'to impose a tax or other charge on.'" Pet. App. 16 (quoting *Random House Dictionary of the English Language* 90 (1979)). As

discussed above, the first of those definitions is a poor fit with the statutory context, which does not use "property" or "income" as the subject of "assessment"; the second refers as easily to the State's understanding of "assessment" as ultimate taxpayer liability as it does to the Ninth Circuit's proposed interpretation of the word. More important, the Ninth Circuit simply omitted an alternative definition from the same dictionary: "2. to fix or determine the amount of (damages, a tax, a fine, etc.)." *Random House Dictionary of the English Language* 90 (1979). That definition – which fits neatly with the surrounding text – corresponds perfectly to the common-sense understanding that "assessment" means ultimate tax liability once all deductions and credits are calculated.

The Ninth Circuit's strained interpretation of "assessment" is inconsistent not only with the term's plain meaning but also with the court's own understanding of the purpose of the Tax Injunction Act. According to the Ninth Circuit, the Tax Injunction Act is implicated only when federal court relief would interfere with a State's ability to collect tax revenue. Pet. App. 21. But even the Ninth Circuit's selected dictionary definitions of "assessment" do not impose that limit. And the Ninth Circuit's own definition – under which a tax *deduction* made in the course of calculating gross revenue is part of an "assessment," though a tax *credit* applied below-the-line is not, Pet. App. 16-17 & n.5 – fails to track the court's notion of statutory purpose. Under the Ninth Circuit's theory, a challenge to a tax deduction would be precluded despite the fact that the relief requested would not hinder the State's ability to collect tax revenue. The Court should therefore reject the Ninth Circuit's construction of "assessment."

3. In Arizona, taxpayers determine their income tax liability by subtracting both allowable deductions and credits. This is readily apparent from the 2000 Arizona Personal Income Tax Return (Form 140), which sets forth the Arizona taxpayer's liability on line 40, after all deductions *and credits* have been taken into account. Joint App. 56. Thus, a district court injunction that disallows tax credits would not allow the State of Arizona to "assess" the tax due under state law.[4] It is therefore prohibited by the Tax Injunction Act.

In sum, the ordinary meaning of "assessment" comprehends any calculation or adjustment that affects the taxpayer's bottom-line liability. That common-sense understanding is confirmed when the term "assessment" is read in context, and in light of Congress's consistent usage of the term in the Internal Revenue Code. This federal-court lawsuit challenging Arizona's tax credit is foreclosed by the plain language of the Act, and that is enough to dispose of this case.

[4] Other state courts also treat tax credits as an integral part of the assessment of taxes. *See* 85 C.J.S. *Taxation* § 1758 (2003) ("in making an assessment [of taxes], the assessing officer should take into account all deductions and credits to which the taxpayer is lawfully entitled, and compute them in the manner required by statute") (citing *Wiegand v. Hefferman*, 368 A.2d 103 (Conn. 1978); *State Tax Comm'r v. Carpenter*, 200 A.2d 437 (Del. Super. 1964); and *Grunewald v. Mich. Dep't of Treasury*, 305 N.W.2d 269 (Mich. App. 1981).

B. Applying the Tax Injunction Act to Preclude Respondents' Lawsuit Challenging Arizona's Tax Credit Is Consistent with the Act's Broad Federalism Purpose.

Because Respondents' lawsuit is barred under the plain language of the Tax Injunction Act, the Court need not resort to legislative history to resolve this case. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989) (resort to legislative history unnecessary where statutory text is clear). However, giving "assessment" its ordinary meaning of "determining the amount of tax owed" is entirely consistent with the congressional purpose behind the Tax Injunction Act. As this Court has long recognized, Congress enacted the Tax Injunction Act to further the broad federalism purpose of limiting federal interference with a core aspect of state sovereignty. Construing the Act to preclude federal-court challenges to state tax credits directly advances this core purpose.

1. In construing the Tax Injunction Act, this Court consistently has been mindful of the broad federalism purpose that underlies the Act. For example, in *Rosewell*, the Court generously interpreted the Tax Injunction Act's "plain, speedy and efficient" language to encompass even a tax refund procedure that does not pay interest on taxes collected under protest. In addition to the Act's language and history, the Court relied on Congress's intent "to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts." 450 U.S. at 515 n.19.

Similarly, in *Grace Brethren*, the Court interpreted the Act to prohibit suits for declaratory relief as well as injunctive relief – even though the Act does not explicitly mention declaratory actions – because "the legislative

history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." 457 U.S. at 409 n.22. Most recently, in narrowly interpreting the judicial exception to the Act for suits by the United States, the Court recognized that "[e]nactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal court intervention in state government." *Farm Credit Servs.*, 520 U.S. at 826-27.

Thus, when interpreting the Tax Injunction Act, this Court has begun with the presumption that "federal law generally will not interfere with administration of state taxes." *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995). Giving the term "assessment" its ordinary meaning and interpreting the Act to preclude federal court interference with all phases of tax administration is entirely consistent with this well-understood congressional purpose.

2. Contrary to this Court's precedents, the Ninth Circuit takes the position that the purpose of the Tax Injunction Act is limited "to prevent[ing] the disruption on a state's efforts to collect tax." Pet. App. 18.[5] But that theory cannot be reconciled with the Act's language, which makes perfectly clear that the scope of the Act is not so

[5] The Ninth Circuit also noted that Congress was concerned about "the discriminatory effect of diversity jurisdiction in tax cases" and intended to eliminate the advantage of foreign parties to avoid paying a disputed tax. Pet. App. 18 n.6. That purpose, the court concluded, is not relevant to the instant case. Pet. App. 18.

confined. The Tax Injunction Act forbids interference not only with the "collection" of state taxes, but with the "assessment, levy *or* collection" of taxes. The Ninth Circuit's reading of the Act to apply only to tax "collection" renders the words "assessment" and "levy" entirely meaningless. Indeed the Ninth Circuit's own definition of "assessment" is inconsistent with the limited purpose that it ascribes to the Act. Under the Ninth Circuit's theory, the term "assessment" extends to above-the-line tax deductions, *see* Pet. App. 16-17 & n.5, despite the fact that a challenge to tax deductions does not interfere with the "collection" of state taxes. Even the Ninth Circuit cannot construe the Act's text in a way that corresponds to its cramped notion of congressional purpose. In fact, the Act's statutory text demonstrates that Congress intended to prevent federal-court interference with more than the collection of state taxes.

Like the plain language of the statute, the Tax Injunction Act's legislative history demonstrates that Congress sought to eliminate federal-court challenges that interfere with the States' administration of their core sovereign functions, and not merely to prevent interference with the collection of revenue. This Court has held that the legislative history of the Johnson Act of 1934 (currently codified at 28 U.S.C. § 1342), is highly relevant in construing the Tax Injunction Act, because the Congress that enacted the Tax Injunction Act expressly relied on the congressional purpose underlying the Johnson Act. *Grace Brethren*, 457 U.S. at 410 n.22. The Johnson Act prohibits federal-court interference with orders issued by state administrative agencies to public utilities. The Johnson Act's legislative history demonstrates that its purpose was to prevent public utilities from avoiding state administrative and

judicial proceedings by going to federal district court to challenge state administrative orders. *See, e.g.*, S.Rep. No. 73-125 at 33 (1933). ("It is the jurisdiction which Congress has given to Federal courts to pass on matters of State regulation which holds up the laws of the States, prevents the officials of the States from doing their duty, and robs the people of the benefit which would accrue to them, if the commissions which they have set up by law in the various States were permitted to perform their duty") (quoted in *Grace Brethren*, 457 U.S. 410 n.22); H.R. Rep. No. 73-1194 at 2 (1934) (in opposition to the Johnson bill, declaring that it "seeks to withdraw completely from the district courts of the United States all jurisdiction in suits relating to orders of State administrative boards or commissions affecting rates chargeable by public utilities") (quoted in *Grace Brethren*, 457 U.S. 410 n.22.); 78 Cong. Rec. 8338 (1934) (remarks of Rep. Tarver) ("The Johnson bill contains but one substantive proposition, and that is to divest the district courts of the United States of jurisdiction in public-utility rate cases") (quoted in *Grace Brethren*, 457 U.S. 410 n.22.); *Id.* at 8419 (remarks of Rep. Hancock) ("the Johnson bill seeks to [save time and money] by divesting the Federal courts of all jurisdiction in public-utility cases except the right of appeal to the Supreme Court of the United States after the final decision of the State court of last resort") (quoted in *Grace Brethren*, 457 U.S. 410 n.22.).

Thus, in relying on the purpose underlying the Johnson Act to support its enactment of the Tax Injunction Act, Congress indicated its concern with federal-court interference with all aspects of state tax administration, and not just interference with the collection of revenue. Like utility

regulation, state tax administration involves a core sovereign function of state government; as with utility regulation, allowing federal courts to pass on state tax issues would inhibit the state officials from doing their duties in implementing the tax system.

Further, the Court has recognized that, just as it was concerned about the federal-court interpretation of state utility law, Congress was also concerned about federal-court interpretation of state tax law. *Fair Assessment*, 454 U.S. at 108-09 n.6 ("'federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts'") (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)). In addressing the importance of the restrictions imposed by the Tax Injunction Act, the Court recently stated: "The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary. The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation." *Farm Credit Servs.*, 520 U.S. at 826.

3. In addition to being contrary to statutory text and legislative history, the Ninth Circuit's position is hopelessly illogical. Congress could not have intended to limit the Tax Injunction Act to cases in which "the adjudication of a constitutional claim in federal court . . . will hamper a state's ability to raise revenue," Pet. App. 21, because that standard would leave the federal courts and litigants with a test that is difficult to manage and leads to absurd results.

Like most other state tax laws,[6] Arizona's tax laws provide numerous credits, deductions, and exemptions from personal income,[7] corporate income,[8] and sales

[6] *See* States' Amici Brief in Support of Petitioner on the Merits at 2-4.

[7] For example, A.R.S. § 43-1022 lists twenty-eight different subtractions for a wide variety of income and expenditures. *See also* A.R.S. §§ 43-1023 (exemptions for blind persons and persons over sixty-five); -1027 (subtraction for wood stoves); -1028 (medical savings accounts); -1030 (subtraction for World War II victims); -1031 (subtraction for constructing an energy efficient residence); -1041 (standard deduction); -1042 (itemized deductions, defined as deductions allowed under the Internal Revenue Code with some adjustments); -1043 (personal exemptions); -1071 (credit for taxes paid to other states); -1072 (earned credit for property taxes); -1072.01 (credit for increased excise taxes paid); -1073 (family income tax credit); -1074 (credit for increased employment in enterprise zones); -1074.01 (credit for increased research activities); -1075 (credit for dependent day care facilities); -1076 (recycling equipment credit); -1077 (credit for employment by qualified defense contractor); -1078 (credit for property tax paid by qualified defense contractor); -1079 (credit for increased employment in military reuse zones); -1080 (credit for construction costs of qualified environmental technology); -1081 (credit for pollution control equipment); -1081.01 (credit for agricultural pollution control equipment); -1081.02 (credit for taxpayers participating in agricultural preservation district); -1082 (credit for construction materials incorporated into qualifying facility); -1083 (credit for solar energy devices); -1084 (credit for agricultural water conservation system); -1085 (credit for corrective action costs for underground storage tanks); -1086 (credit for alternative fuel vehicles); -1086.01 (credit for vehicle refueling apparatus and infrastructure); -1086.02 (credit for alternative fuel delivery systems); -1087 (credit for employment of temporary assistance for needy families recipients); -1088 (credit for contribution to charitable organization that provides assistance to the working poor); -1088.01 (credit for technology training); -1089 (credit for contributions to school tuition organization); -1089.01 (tax credit; public school fees and contributions); -1089.02 (credit for donation of school site); -1090 (credit for solar hot water heater etc.); 16-954(B) (credit for contributions to Citizens Clean Election Fund).

[8] A.R.S. §§ 43-1122 through -1130.01.

tax.[9] If, as the Ninth Circuit believes, the Act were limited to cases in which litigation would hinder tax collection, then federal court jurisdiction would turn on whether a given state policy was implemented in the form of a selective tax or a selective tax exemption, deduction, or credit.

For example, if a State wished to impose a tax on dividends, but not dividends from corporations doing most of their business in the State, it could do so in two ways. First, it could enact a tax on dividends received from corporations doing less than half of their business in the State. Alternatively, it could enact a tax on all dividend income, with a deduction or subtraction for dividends received from corporations doing at least half of their business in the State. Under the Ninth Circuit's interpretation of the Tax Injunction Act, taxpayers could not challenge the first provision in federal court because an injunction against the enforcement of the deduction would increase revenues. The challenge to the second provision, on the other hand, which reflects precisely the same state policy, could be brought in federal court. This Court has recognized in the Commerce Clause context that there is no meaningful distinction between a tax credit given to favored taxpayers and a tax penalty imposed on disfavored taxpayers. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 579 (1997) (invalidating tax

[9] For example, the statute defining the tax on retail sales specifically excludes fifty-three categories of receipts and provides for more than twenty-five deductions. A.R.S. § 42-5061(A), (B), (E), (K) and (L). Under the Ninth Circuit's interpretation of the Act, each of these categories could be challenged in federal court.

scheme granting tax exemptions to in-state taxpayers; no distinction between deprivation of the tax benefit as compared to the imposition of "taxes targeting out-of-staters alone"); *see also Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (state tax scheme "unquestionably discriminates against interstate commerce . . . as the necessary result of various tax credits and exclusions."). There is no reason to import one into the Tax Injunction Act, as the Ninth Circuit has done here.

Moreover, the Ninth Circuit's proposed rule would invite taxpayers who do not want to go through the normal state tax proceedings to obtain federal court jurisdiction by clever pleading. For example, in the Ninth Circuit, a taxpayer challenging a state tax deduction as discriminatory under either the Equal Protection Clause or the Commerce Clause can go to federal court and seek injunctive relief against the allowance of the deduction to its competitors. If successful, it could then use the judgment as the basis for a tax refund claim in a state court proceeding. Avoiding this type of jurisdictional gamesmanship in tax disputes is one reason why the Tax Injunction Act is given a broad interpretation. *Cf. United States Brewers Ass'n, Inc. v. Perez*, 592 F.2d 1212, 1214 ("The requested injunction . . . could be framed in two ways, either by ordering the state not to collect the tax increase or by requiring the state to levy the tax hike on exempt as well as nonexempt parties.").

Finally, a rule that distinguishes between challenges to state taxes that adversely affect state revenue and those that do not is inherently unmanageable. In this case, the Ninth Circuit jumped to the conclusion that invalidating a tax credit will necessarily *enhance* the State's ability to collect revenue, so that a challenge to a tax credit does not

implicate the Tax Injunction Act. Pet. App. 20. But, as the Fifth Circuit noted in *Bridges*, "it is not necessarily true that declaring the exemptions to be unconstitutional will result in the State collecting more taxes." 334 F.3d at 421. "[T]he State may resolve any putative constitutional problems created by the challenged statutes by exempting more entities and therefore collecting less taxes." *Id.* This is a case in point. A tax credit ruled unconstitutional on Establishment Clause grounds might be stricken altogether, increasing state tax revenue, or it might be cured by expanding the credit (for instance, by expanding the tax credit for donations to public schools), with the result that state tax revenue would decrease. In any event, the invalidation of a tax credit may result in a host of other litigation that affects a State's ability to raise revenue. In short, it may be impossible to know at the outset of litigation precisely how a successful challenge to a tax credit (or any other feature of a state tax scheme) will affect state revenue collection. There is no reason to think that Congress intended federal court jurisdiction to turn on that elusive factor.

The Court should interpret the Tax Injunction Act consistent with its language and purpose to provide clear guidance to the federal courts and litigants concerning the scope of federal court jurisdiction over state tax matters. Because this lawsuit falls within the prohibition of the Tax Injunction Act, the Court should order it to be dismissed.

C. The Principles of Comity Preclude the District Court from Granting Respondents Injunctive and Declaratory Relief that Interfere with State Tax Administration.

The plain terms of the Tax Injunction Act are enough to resolve this dispute. But even if the Tax Injunction Act did not preclude Respondents' federal-court action, the principles of comity would. In rejecting this alternative argument, the Ninth Circuit again relied on a supposed distinction between federal-court "litigation that interferes with the ability of the states to raise necessary tax revenues" and federal-court litigation that does not. Pet. App. 26. That holding ignores the crucial federalism underpinnings of the Court's comity decisions and the disruptive effect on state tax administration that could result if the district court granted the relief that Respondents request. Because Respondents seek equitable relief that interferes with state tax administration, the principles of comity bar this lawsuit.

1. The Court has long recognized that principles of comity between federal courts and state governments guide federal courts of equity to withhold injunctive relief where state law affords an adequate remedy. *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). Because of the role of states as co-sovereigns within our federal system, comity requires federal courts to exercise "scrupulous regard for the rightful independence of state governments . . . and a proper reluctance to interfere by injunction with their fiscal operations." *Id.*

That expansive principle is broader than the terms of the Tax Injunction Act, and applies even in cases that are not covered by the Act. For instance, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943),

the Court relied on comity to hold that federal courts may not exercise their equitable discretion to grant declaratory relief as to the constitutionality of state tax laws – even if the language of the Tax Injunction Act does not bar such suits. In *Rosewell,* the Court recognized that "even where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." 450 U.S. at 525 n.33. Later, in *Fair Assessment*, the Court held that the principles of comity bar taxpayers' suits in federal court for 42 U.S.C. § 1983 damages to redress allegedly unconstitutional administration of a state tax system, provided there is an adequate state-law remedy. 454 U.S. at 116. Although the Tax Injunction Act did not specifically prohibit damage actions, the Court concluded that "[n]either the legislative history of the Act nor that of its precursor, 28 U.S.C. § 1342, suggests that Congress intended that federal-court deference in state tax matters be limited to the actions enumerated in those sections." *Id.* at 110. Because the Court found that damage actions would be as disruptive to state tax administration as equitable relief, it concluded that the damage actions were also barred by comity. *Id.* at 113-14.

In all of these cases, the Court has applied the principles of comity expansively to avoid disruption to state tax administration. The Ninth Circuit takes the view that because *Great Lakes* and *Fair Assessment* concerned litigation that could interfere with state revenue collection, the rationale of those cases is limited to concerns about tax collection. Pet. App. 23-26. That is incorrect. The Court's primary concern in those cases was to avoid disruption to the states' tax administration system and prevent federal-court intrusion in matters that are of

particular state concern. As the Court stated in *Fair Assessment*, "federal court restraint in state tax matters was based upon the traditional doctrine that courts of equity will stay their hand when remedies at law are plain, adequate, and complete." 454 U.S. at 108; *see also Great Lakes*, 319 U.S. at 298 ("It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."). The same rationale applies here.

2. The Ninth Circuit failed to appreciate not only the scope of the principles of comity but also the extent to which they would be undermined by the relief requested by Respondents. The court below was confident that Respondents' federal-court action would not disrupt Arizona's tax administration in the slightest. Pet. App. 26. That is not so. Respondents request a declaration that the tax credit in A.R.S. § 43-1089 is unconstitutional on its face and as applied. Joint App. 15. They also request an injunction that prohibits the State from allowing taxpayers to utilize the tax credit for payments to STOs that make tuition grants to children attending religious schools and ordering the State to inform those same STOs to return all unexpended funds to the state general fund. *Id.* A court order preventing the State from allowing some credits authorized by state law and leaving others in place is inherently disruptive and will prevent the State from determining the final tax obligation of thousands of taxpayers until the litigation is ended. If an injunction is issued, the State will have to notify all taxpayers of the uncertain nature of the credit, and will probably receive thousands of protective claims for refund from taxpayers who want to preserve their rights to the credit while the

case is still pending. If the injunction is overturned, the State will have to expend monies processing refunds and paying interest. It is also unclear whether, if Respondents prevail on the merits, the State would have to disallow credits carried over from one year to the next, credits for taxpayers audited in the future for prior years, and credits claimed on returns filed for prior years. Any of these issues could raise equal protection problems if similarly situated taxpayers are treated differently.

Moreover, striking down Arizona's STO tax credit would result in precisely the type of harm and disruption the principles of comity are designed to prevent. The Arizona Supreme Court has already ruled on the issues raised by Respondents. *Kotterman*, 972 P.2d at 610, 616. A contrary ruling by the federal district court and the Ninth Circuit would create a direct conflict with the Arizona Supreme Court. The conflicting rulings would require the State either to treat similarly situated taxpayers differently (that is, allowing the parties to the state litigation to use the credit but not permitting the parties to the federal ruling to use the credit) or to follow the state or federal decision in defiance of the other court's ruling. In either event, the result would be uncertainty for Arizona's taxpayers and tax administrators that could only be resolved by another petition to this Court.

Because Respondents' litigation attacks a fundamental element of Arizona's tax administration and Respondents have an adequate state law remedy, the Court should hold that the principles of comity bar this lawsuit.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals for the Ninth Circuit and remand to the district court to dismiss this matter.

Respectfully submitted,

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No. 02-1809

In The

Supreme Court of the United States

L. ELLIOT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN WINN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether either the Tax Injunction Act, 28 U.S.C. § 1341, or principles of federal-state comity deprive district courts of jurisdiction to consider challenges to unconstitutional state tax credits.

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STATEMENT OF THE CASE

The Arizona Private-School Tax-Credit Program

This case involves an Establishment Clause challenge to an unusual Arizona statute, enacted in 1997, that uses state income-tax credits to provide tuition funding for non-public primary and secondary school education, but that does so in a way that does not permit parents full freedom to use the funding at non-religious schools.[1] Under the statute, all Arizona individual taxpayers, whether or not they have children in school, may satisfy part or all of their state income-tax liability each year by paying up to $500[2] of the income taxes due to the state for that year to a "school tuition organization" (STO), rather than to the Arizona Department of Revenue. Each taxpayer who makes such a payment receives a credit against income taxes for the entire amount transferred to the STO. The STO, in turn, must use those tax payments to provide scholarships for students attending non-public schools, including religious schools.

At the time suit was brought in this case, approximately thirty-five STOs had been established to take advantage of the Arizona tax-credit program. Almost all of these STOs have been established by religious organizations and are specifically religious in nature – they make scholarship grants only to students attending schools of a particular religious denomination and they may restrict their grants to students of that denomination. Joint

[1] Ariz. Rev. Stat. § 43-1089. The text of § 1089 is reproduced in the Appendix to the Petition for Certiorari (Pet. App.) 37-38.

[2] The amount for married taxpayers filing jointly is $625. Ariz. Rev. Stat. § 42-1089(A)(2), Pet. App. 37.

Appendix (J.A.) 12. The STO that received the largest amount of tax-credit revenues in 1998 (the first year of the statute's operation) was the Catholic Tuition Organization of the Diocese of Phoenix, which restricts its scholarship grants to students attending Diocese schools. J.A. 10-11. The second largest STO recipient of tax-credit revenues that year was the Arizona Christian School Tuition Organization, which restricts its scholarships to students attending "evangelical" Christian schools in Arizona. J.A. 11. The third largest recipient was the Brophy Community Foundation, which restricts scholarships to students attending one of two single-sex Catholic schools in Phoenix. J.A. 11. Other STOs include the Christian Scholarship of Arizona, the Northern Arizona Christian School Scholarship, and the Higher Education Lutheran Program. J.A. 12. In the first full year of the Arizona statute's operation, at least 94% of the tax-credit funds transferred to STOs went to such religion specific STOs. J.A. 10. Individuals who owe income taxes to the state may thus direct that a substantial portion of those taxes be used to support only students of a particular religious denomination or only students attending religious schools of a particular religious denomination. Taxpayers may even designate the particular student or students who are to receive scholarships out of their taxes, so long as they do not designate their own dependents. A.R.S. § 43-1089(D).

As the Arizona tax-credit program is administered, it differs significantly from the Ohio voucher program upheld by this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Unlike the voucher program in *Zelman*, in

Arizona STOs may not defray public school academic fees[3] and they are permitted to grant private-school scholarships without regard either to financial need or the quality of the public school a student applicant would otherwise attend. In Arizona, tax-credit revenues may be, and are, used to subsidize religious-school tuition for students from affluent families, for students who are already attending religious schools, and for students in public school districts with excellent schools.[4] The Arizona program also does not insure that scholarships will be available to students wishing to attend non-religious schools. Since almost all tax-credit funds are controlled by religion-specific STOs, parents who wish to send their child to a non-religious private school may be unable to find an STO willing or able to make a grant to a student attending that school. J.A. 13.

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[3] Arizona does have a separate program under which a smaller tax credit ($200) is given for payments supporting public school extracurricular (not curricular) activities, such as class trips. Ariz. Rev. Stat. § 43-1089.01. Parents can use these credits to pay activity fees so that the fees are paid by the state, at no cost to the parent.

[4] Parents whose children attend a religious school may also engage in a "contribution exchange," where the parents of student A designate a $625 scholarship at the school for student B, while the parents of B do the same for student A. Each of these $625 "contributions" lowers each couple's state income taxes by $625 with the result that, at no cost to themselves, each couple lowers its religious-school tuition costs by $625, and the state's income tax revenues decline by $1,250. J.A. 13-14. Parents may defray their entire religious-school tuition cost if they get a sufficient number of taxpaying friends and associates to designate their child as the recipient of an STO scholarship. The $625 "contributions" to this scholarship come at absolutely no cost to the "donors."

The History Of This Litigation

Respondents challenged the Arizona program, as applied, in the United States District Court for the District of Arizona.[5] Basing their federal cause of action on 42 U.S.C. § 1983, and federal jurisdiction 28 U.S.C. §§ 1331 and 1342(a), respondents sought declaratory and injunctive relief against the Director of the Arizona Department of Revenue prohibiting the continued use of tax credits to

[5] Prior to the effective date of the Arizona statute, litigation challenging it on its face was brought, via special action, directly in the Arizona Supreme Court. That court held, by a three to two vote, that § 1089 was not unconstitutional under either the Arizona or United States Constitution. *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). The administration of § 1089, however, differs significantly from assumptions made by the Arizona Supreme Court in *Kotterman* regarding the operation of the statute. Among other things, the *Kotterman* court appeared to assume that all STOs would make scholarships available without regard to the religious or non-religious character of the private school a student wished to attend. The *Kotterman* court also had no information before it regarding whether STOs would take financial need, public school quality or religious affiliation into account in awarding scholarships, nor did it know of the overwhelming percentage of tax-credit scholarship aid that would be channeled through religion-specific STOs, with the result that tax-credit scholarships to non-religious schools may not be available. The case now before the Court challenges § 1089 as applied, relying in large part on these aspects of the statute's application.

Neither the current plaintiffs nor the Arizona Civil Liberties Union were parties to the *Kotterman* litigation in the Arizona Supreme Court. Petitioner did not invoke the *Kotterman* litigation as a basis for his motion to dismiss, but relied entirely upon the Tax Injunction Act and the Eleventh Amendment. J.A. 17-26. The district court relied solely on the Act and comity in finding a lack of subject-matter jurisdiction, without reaching the Eleventh Amendment contention. Pet. App. 36. The issues presented to the Court in this case are therefore identical to those that would arise had § 1089 never been facially challenged in state court.

fund religious education. J.A. 7-16. Petitioner moved to dismiss on the basis of the federal Tax Injunction Act, 28 U.S.C. § 1341, and the Eleventh Amendment. J.A. 17. The district court granted this motion, holding that respondents' suit constituted an attempt, barred by the Act, to have the federal district court restrain the "assessment" of state taxes. The court held, alternatively, that principles of federal-state comity prohibit federal district courts from interfering with a state's ability "to administer its taxing system in accordance with the state's priorities and needs." Pet. App. 27-23.

The court of appeals unanimously reversed. Pet. App. 11-26. It held that the district court's decision that respondents' suit sought to restrain the "assessment" of Arizona's income tax within the meaning of the Tax Injunction Act was "supported neither by any precedent interpreting 'assessment' in this manner, nor by the meaning of the word itself." Pet. App. 16. Nor did respondents' suit involve any "violation of the purposes or policy underlying the Tax Injunction Act," which were to bar federal district courts from preventing a state's collection of tax revenues. Pet. App. 18. The court explained that the invalidation of a tax credit, unlike the invalidation of a tax or a collection method, "does not adversely affect the state's ability to raise revenue." Pet. App. 20.

The court of appeals also rejected the district court's alternative use of the principle of federal-state comity to preclude federal jurisdiction. Pet. App. 23-25. The appeals court recognized that this Court has twice used comity to

bar district court jurisdiction in cases in which the constitutionality of a state tax law was challenged.[6] Both of these cases, however, were ones "in which the plaintiffs sought to stop the collection of a tax." Pet. App. 23. The tax provision challenged in the instant case, by contrast, "is a limited, discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes . . . and would, in fact, produce substantial additional revenue for the state." Pet. App. 26. Arizona had identified "no harm that renders federal court review of this statute any more intrusive on the state's sovereignty than the review of any other state statute that is alleged to be unconstitutional." *Ibid.*

Petitioner did not file a petition for rehearing or rehearing *en banc* in the court of appeals. After the time to petition for rehearing had expired, the court of appeals, at the *sua sponte* request of a judge of the circuit, directed the parties to file briefs regarding whether the case should be reheard *en banc*. Pet. App. 1. With Judges Kleinfeld and O'Scannlain dissenting, Pet. App. 2-10, the court voted against *en banc* reconsideration. Pet. App. 1.

SUMMARY OF ARGUMENT

Congress did not intend the Tax Injunction Act to prohibit federal district courts from exercising jurisdiction in all cases concerning the constitutionality of state tax laws. The Act applies, instead, only to federal lawsuits in which the relief sought would temporarily or permanently

[6] The cases are *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), and *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), discussed at 39-42, *infra*.

stop a state from collecting taxes. The Act, therefore, and the associated principle of federal-state comity on which petitioner in this case alternatively relies, do not prohibit federal district courts from adjudicating constitutional challenges to state tax credits, because the invalidation of a credit will not ordinarily interfere in any way with a state's ability to continue to assess, levy and collect its tax revenue.

Petitioner and his *amici* contend that tax credit challenges are subject to the Tax Injunction Act (or the associated principle of comity) because the Act applies whenever the relief sought in federal court would either affect the "bottom line" tax liability of any state taxpayer, or "any aspect" of state tax administration. These contentions are erroneous. The text, legislative history and consistent judicial interpretation and application of the Act show that it applies only when a lawsuit seeks temporarily or permanently to withhold tax revenues from a state – relief that a constitutional challenge to a tax credit does not request.

The text of the Act does not support petitioner's contention. The Act provides that a district court shall not enjoin the "assessment, levy or collection" of state taxes. This Court has correctly and repeatedly held that this language bars district court jurisdiction only when suits would "stop . . . the collection of taxes." Suits seeking to invalidate tax credits have no such effect.

The legislative history of the Act confirms this interpretation. Congress enacted the Tax Injunction Act in 1937 to prevent state taxpayers from using federal court litigation to enable them to withhold taxes from the state "thereby disrupting government finances." This explicit revenue-protective purpose has no application to a tax-credit challenge like that in the present case.

Judicial interpretations and applications of the Tax Injunction Act are in complete accord. This Court has, on numerous occasions, explained that the Act is a "vehicle to limit drastically federal court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). The Court has itself on at least three occasions adjudicated the merits of important federal-court constitutional challenges to state tax credits or deductions. A large number of cases have challenged state tax credits or exclusions in federal court, without objection to jurisdiction by the state defendants. In the rare cases in which district court jurisdiction has been challenged, its existence has been confirmed. With the exception of one Fifth Circuit decision rendered after the petition for certiorari here was filed, the courts of appeals have uniformly held that the Tax Injunction Act applies only when district courts are requested to "interfere with the collection of state taxes." *See, e.g., Dunn v. Carey*, 808 F.2d 555, 557 (7th Cir. 1986) (Easterbrook, J.). No case prior to the district court decision in this case had ever applied the Tax Injunction Act to a federal challenge to a state tax credit.

Petitioner contends that the decision below is in conflict with settled law, citing cases in the First, Fifth, Sixth and Eleventh Circuits. The settled law, however, prior to the district court decision below and the recent Fifth Circuit decision, has been that the Act does not bar such challenges. The cited cases from the First, Sixth and Eleventh Circuits do not involve constitutional challenges to tax credits and are clearly distinguishable on other grounds from the present case. The Fifth Circuit case, decided after the court of appeals opinion in this case, is the only court of appeals decision applying the Tax Injunction Act to a tax benefit challenge.

In its *amicus* brief, the United States correctly contends that the meaning of the Tax Injunction Act is informed by the interpretation that has been given to the 1867 federal Anti-Injunction Act, 26 U.S.C. § 7421(a), which uses similar language to deprive district courts of jurisdiction to restrain the collection of federal taxes. Interpretations and applications of that Act, however, have repeatedly and expressly *excluded* attacks on the validity of federal tax credits, deductions and exemptions from the ambit of the Anti-Injunction Act.

Petitioner argues that, even if the Tax Injunction Act does not bar district court jurisdiction here, principles of federal-state comity preclude the district court from addressing the merits of respondents' constitutional challenge. This Court's cases applying comity to state tax cases, however, do so only because the relief requested in those cases would have directly interfered with a state's ability to collect tax revenue. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). No aspects of the relief requested in the present case would create any undue burden on, or intrusion into, state affairs.

Finally, tax credits have, in the past, been a device through which states and localities have at times sought to avoid compliance with federal constitutional commands. In the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), for example, resistance to the *Brown* decision took the form of tax credits for contributions to racially discriminatory schools, or tax exemptions for racially segregated institutions. Arizona, in this case, has used tax credits to implement a school voucher scheme that differs significantly from that approved by the Court in *Zelman v.*

Simmons-Harris, 536 U.S. 639 (2002). As administered, the Arizona scheme does not provide parents with constitutionally required full freedom to use state tuition support at non-religious as well as religious private schools. State funding programs should not be immunized from federal judicial challenge because they use tax credits, rather than more traditional funding mechanisms to achieve unconstitutional results.

ARGUMENT

I. THE TAX INJUNCTION ACT DOES NOT PRECLUDE FEDERAL DISTRICT COURT CHALLENGES TO UNCONSTITUTIONAL STATE TAX CREDITS.

Introduction

Respondents have invoked the civil rights jurisdiction of the federal District Court for the District of Arizona in order to challenge the constitutionality, under the First Amendment's Establishment Clause, of Arizona's use of state income-tax credits to fund religious-school education. Original federal jurisdiction has, without objection, repeatedly been invoked for that and similar purposes despite the enactment of the Tax Injunction Act in 1937. Indeed, this Court's two leading cases addressing the constitutionality under the Establishment Clause of state income-tax credits and deductions for religious school tuition – *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (tax credits), and *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deductions) – were both initiated through litigation begun in district courts. And in *Griffin v. Prince Edward County*, 377 U.S. 218, 232-233 (1964), a constitutional challenge to state tax credits used to support school racial segregation, the Court had "no

doubt of the power" of the district court to enjoin use of the credits.

The explanation for the continued recognition of this federal district court jurisdiction, despite the 1937 enactment of the Tax Injunction Act, is straightforward. That Act withdraws district court jurisdiction over suits by taxpayers only if such suits seek to "enjoin, suspend or restrain" the "assessment, levy or collection" of "any tax under state law." 28 U.S.C. § 1341.[7] The Act was meant to prevent state taxpayers from using the federal courts to prevent the state from imposing or collecting taxes from them. Constitutional challenges to state tax credits, deductions and similar tax benefits, however, are not suits by taxpayers seeking to postpone or avoid the payment of state taxes. Such suits thus do not seek to "enjoin, suspend or restrain" the "assessment, levy or collection" of taxes. They seek, instead, to prohibit the state from unconstitutionally excusing some taxpayers from paying taxes that would otherwise be due. If a challenge to a tax credit is successful, the tax in question is not enjoined, restrained or suspended – it remains in full force.

In this Court's most recent statement on the subject – Justice Ginsburg's opinion for a unanimous Court in *Jefferson County v. Acker*, 527 U.S. 423, 433 (1999) – the Court thus explained that the Tax Injunction Act applies only to suits "to stop . . . the collection of taxes." Identical explanations appear in this Court's opinions in *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (Brennan, J.)

[7] The Act applies only where "a plain, speedy and efficient remedy may be had" in the courts of the state. 28 U.S.C. § 1341. That issue is not involved in this case.

(Tax Injunction Act is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a concern as the collection of taxes"); *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (O'Connor, J.) (Declaratory judgment that state taxes are unconstitutional is prohibited by the Tax Injunction Act because such a judgment " 'may in every practical sense operate to suspend collection of state taxes until the litigation is ended' " (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943))); *Arkansas v. Farm Credit Servs. of Cent. Arkansas*, 520 U.S. 821, 823 (1997) (Kennedy, J.) (Tax Injunction Act restricts the "power of federal district courts to prevent collection or enforcement of state taxes"); *see also Dunn v. Carey*, 808 F.2d 555, 557 (7th Cir. 1986) (Easterbrook, J.) ("The Tax Injunction Act applies only to requests that federal courts interfere with the collection of state taxes"); *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975) (Friendly, J.) (Congress meant to forbid federal restraint of "methods ... that would produce money or other property directly [to the state]").

Neither the Tax Injunction Act nor the associated principle of comity upon which petitioner alternatively relies had thus ever been used, prior to the district court's decision in this case, to deprive federal courts of original jurisdiction to consider challenges to the constitutionality of state tax credits. On the contrary, such challenges have repeatedly been brought and adjudicated in federal district courts, reviewed on the merits in the courts of appeal, and, on at least three occasions, reviewed on the merits in this Court, without federal jurisdiction being questioned by the

state litigants and without any court ever having held (or any opinion ever having argued) that federal jurisdiction was precluded.[8] In the rare case where federal jurisdiction has been questioned by a state defendant, jurisdiction has been affirmed. *See, e.g., Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996). In *Rojas* the Tax Injunction Act was held to be inapplicable to a constitutional challenge to a tax exemption because the suit would not " 'operate to suspend collection of taxes' ". *Id.* at 159 (quoting *Grace Brethren Church*, 457 U.S. at 408).

Despite this completely settled law, petitioner and his *amici* now seek to have the Court hold that the Act prohibits federal challenges to the constitutionality of state tax credits because the Act applies whenever any taxpayer's liability would be changed or whenever any "aspect[ ] of state tax administration" is involved, regardless of whether there is any "interference with the collection of revenue." Pet. Br. 20. If this contention is correct, the Court's landmark Establishment Clause decisions in *Mueller v. Allen* and *Committee for Public Education v. Nyquist* were rendered without subject-matter jurisdiction, as were the tax-credit and tax-exclusion portions of the Court's desegregation ruling in *Griffin v. Prince Edward County*. Likewise, the large number of lower federal court cases adjudicating constitutional challenges to state tax credits since enactment of the Tax Injunction Act were all similarly decided without subject-matter jurisdiction.[9]

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[8] *See infra*, at 21-27.

[9] Although the Tax Injunction Act's language restricting the district courts' "jurisdiction" was removed in the 1948 statutory revision, "the Act continues to be interpreted as 'jurisdictional' and

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Petitioner's proposed new interpretation of the Tax Injunction Act is, however, demonstrably incorrect. The text and legislative history of the Act make clear that this and other courts have accurately concluded that the Act bars federal jurisdiction over constitutional attacks on state tax laws only when those attacks would temporarily or permanently stop the state from collecting tax revenue. Federal courts have acted on that assumption for more than sixty-five years. If the well-established federal jurisdiction to prevent states from using tax credits to accomplish unconstitutional purposes is now, for some reason, to be withdrawn or modified, that decision lies with Congress, not this Court.

A. The Text And Legislative History Of The Tax Injunction Act Show That The Act Does Not Apply To Challenges To Tax Credits, But Only Where The Relief Sought Would Prevent A State From Collecting Tax Revenue.

1. The Statutory Text

The Tax Injunction Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

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hence nonwaivable." FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996) p. 1217.

On their face, these words have no application to a federal constitutional challenge to a state tax credit. In such suits, the district court is asked to order state tax officials not to permit taxpayers to claim the challenged credit when computing their tax liability. That kind of judicial relief in no way "enjoin[s], suspend[s] or restrain[s]" a state from "assess[ing], levy[ing] or collect[ing]" its income tax. *Id.* As the Court explained in *Jefferson County v. Acker*, the Act "[b]y its terms" bars "suits *to stop* ('enjoin, suspend or restrain') the collection of taxes." 527 U.S. 423, 433 (1999) (emphasis added). The invalidation of a tax credit does not stop, or in any way suspend or interrupt, the assessment, levy or collection of a state tax.

Petitioner argues at length (Pet. Br. 10-19) that a taxpayer's claim of an income-tax credit is part of the process of "assessing" the income tax due for purposes of the Tax Injunction Act. Petitioner reads "assessment" as referring to " 'the process of calculating a person's final tax bill, after all deductions and credits are accounted for.' " Pet. Br. 11-12. "Assessment," in petitioner's view, is "any calculation or adjustment that affects the taxpayer's bottom-line liability." *Id.* at 16.

The term "assessment" is used in the law of taxation in a wide variety of ways. In the property-tax context, "assessment" ordinarily refers to the process through which the taxing authority assigns a taxable value to the real or personal property to be taxed. The assessed value is then multiplied by the applicable tax rate in order to calculate the amount of taxes due.

Income taxes, however, are commonly self-assessed – the taxpayer, rather than the taxing authority, makes the relevant calculations in the first instance. If the term "assessment" is to be applied to a part of the income taxing

process in the same way as it is ordinarily applied to property taxes, the "assessment" of income taxes would appear to be the determination (either initially by the taxpayer or subsequently by a government auditor) of the amount of taxable income. The income-tax rate is applied to that assessed amount of taxable income to arrive at the amount of tax. Under that approach, tax credits, which are applied to lower the taxpayer's tax bill *after* the amount of tax is computed, have nothing whatsoever to do with the "assessment" of the income tax.

But even if petitioner is correct is arguing, as he does, that "assessment" occurs in the income-taxing process only in the calculation of "a person's final tax bill, after all deductions and credits are accounted for," the fact remains that a suit challenging the constitutional validity of an income tax credit does not seek "enjoin, suspend or restrain" that assessment. In *Jefferson County*, the Court explained that those words refer to suits seeking "to stop" the collection of taxes. 527 U.S. at 433. As we demonstrate in the next section of this brief, preventing district courts from stopping the assessment or collection of taxes was clearly the purpose of Congress in enacting the Tax Injunction Act. If a suit to invalidate tax credits is successful, however, the state's tax assessment process will not be stopped; the assessment will instead proceed with full effectiveness: Every taxpayer who would have been assessed income taxes if the challenged credit were not invalidated will still be assessed income taxes; some taxpayers will be assessed a greater amount of taxes, and some taxpayers who would not be assessed taxes at all if permitted to use the credit will, instead, be subject to an income-tax assessment. The amount of tax payable by some taxpayers would increase, but that can hardly be characterized as an injunction or restraint of the assessment process. *See* 12 MOORE'S

FEDERAL PRACTICE § 57.25[2][b] (3d ed. 2003) ("A suit to *collect* tax is not one brought to restrain state action" within the meaning of the Tax Injunction Act.)

As an alternative to his argument based on the meaning of the statutory term "assessment," petitioner departs completely from the language of the Tax Injunction Act and contends that Congress intended the Act to prevent federal court interference with "all aspects of state tax administration," whether or not there is any federal court "interference with the collection of revenue." Pet. Br. 20. Petitioner would thus rewrite the Tax Injunction Act to provide that the district courts shall not enjoin, suspend or restrain "the assessment, levy, collection, *or any other aspect of the administration*, of any tax under State law . . ." (emphasis added). Congress could certainly have written and enacted such a statute, but it did not. Compare, for example, Congress's 1935 amendment to the Declaratory Judgment Act, 28 U.S.C. § 2201, providing that declaratory judgments should not be available "with respect to federal taxes." It would have been quite simple for Congress simply to have provided two years later that federal jurisdiction should not exist "with respect to state taxes," if that was what Congress intended. Congress deliberately chose instead to address only those attacks on state tax laws that would stop the state from assessing, levying or collecting tax revenue.[10]

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[10] Petitioner urges the Court to model its construction of the Tax Injunction Act on the meaning of the Johnson Act, 28 U.S.C. § 1342, which provides that "[t]he district courts shall not enjoin, suspend or restrain *the operation of, or compliance with*" public utility rate orders made by state regulatory bodies (emphasis added). The language of the two statutes, however, is significantly different. The Tax Injunction Act

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2. *The Legislative History*

The legislative history of the Tax Injunction Act is completely unambiguous. The 1937 Act had two express and closely-related state revenue-protective purposes – (1) to prevent "out of state corporations asserting diversity jurisdiction" from using the federal courts to avoid state-court "pay first and litigate later" rules, and (2) to prevent "taxpayers, with the aid of a federal injunction" from "withhold[ing] large sums, thereby disrupting government finances." FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1216-1217 (4th ed. 1996). The three-page Senate Judiciary Committee Report recommending passage of the Act thus begins by explaining that the bill that became the Act would amend the Judicial Code "with respect to the jurisdiction of the district courts of the United States over suits relating to the *collection of State taxes.*" S.REP. NO. 75-1035 at 1 (1937) (emphasis added).

The Report then explains that, with regard to the first of the reasons for the Act's passage, it is "common practice" for state statutes to require that taxpayers be able to "contest their taxes only in refund actions after payment under protest;" that such statutes "make[ ] it possible for the states and their various agencies to survive while long-drawn out tax litigation is in progress;" and that "[i]f those to whom the federal courts are open may secure injunctive

prohibits interference, not with "the operation of or compliance with" state tax laws, but only with those aspects of state tax laws (assessment, levy and collection) that are needed to produce revenue. Petitioner's argument would be convincing if the Tax Injunction Act provided that the district courts should not enjoin, suspend or restrain the "operation of state tax laws."

relief against the collection of taxes, the highly unfair practice is presented to the citizen of the State being required to pay first and then litigate, while those privileged to sue in federal courts need only pay what they choose and withhold the balance during the period of litigation." *Id.* at 1-2.

With regard to the Act's second purpose, the Report explains:

> The existing practice of the federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of those States for this tax money is so great that in many instances they have been compelled to compromise those suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.[11]

S.REP. 75-1035 at 2 (1937).

It is simply impossible to read this language as supporting the application of the Tax Injunction Act to bar original federal jurisdiction over challenges to the constitutionality of state

[11] For the Court's convenience, we have reproduced the brief Senate Report in an appendix to this brief. There is nothing in the Report that in any way detracts from the clear meaning of the Report language quoted in the text. In concluding, the Report cites "the compelling needs of many States for a more prompt disposition of tax controversies *of the character referred to* . . ." (emphasis supplied). This language is inconsistent with petitioner's assertion that the Act applied to all tax controversies. The remarks on the Senate floor of Senator Bone, the primary sponsor of the Act, are entirely consistent with the language of the Senate Report. *See* 81 CONG.REC. S1415-1416 (1937).

tax credits. Such suits do not in any way constitute an end run around state "pay first, litigate later" policies. They do not permit taxpayers to withhold state taxes prior to, during, or after litigation. They do not disrupt state finances or deprive states of tax revenues.

To deprive litigants who are not seeking to withhold taxes from the state of a federal forum for challenging tax credits that violate the federal constitution would thus be to enlarge the scope of the Tax Injunction Act far beyond both of Congress's explicit revenue-protective purposes. All scholarly authorities on federal jurisdiction agree. *See* 17A MOORE'S FEDERAL PRACTICE § 121.41[1] (3d ed. 2003) (Act "seeks to avoid interference by federal courts that would 'threaten the flow of general revenue to or the budgets of state governments.'" (quoting *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 930 (9th Cir. 1996)); 12 MOORE'S FEDERAL PRACTICE § 57.25[2][b] (3d ed. 2003) ("A suit to collect tax is not one brought to restrain state action; therefore, it is not within the Act's description of suits that are bound from adjudication by federal courts"); WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 4237 (2d ed. 2001) (Tax Injunction Act was "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981)); *see also* FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1216-1217 (4th ed. 1996) (Act was designed to prevent avoidance of state pay first, litigate later, rules and to prevent taxpayers using federal injunctions to "withhold large sums, thereby disrupting government finances.")

B. Federal Courts, Including This Court, Have Not Applied The Tax Injunction Act To Constitutional Challenges To State Tax Credits.

As noted above, on at least three occasions since the enactment of the Tax Injunction Act this Court has adjudicated the merits of important constitutional challenges to state tax credits or deductions that were initiated in federal district courts. Two of these cases, *Committee for Public Educ. and Religious Liberty v. Nyquist*, and *Mueller v. Allen*, were, like the present case, challenges based on the Establishment Clause. In both of those cases, plaintiffs invoked original federal district court jurisdiction. *See Nyquist*, 350 F. Supp. 655 (S.D.N.Y. 1972) (three-judge court); *Mueller*, 514 F. Supp. 998 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982). *Nyquist* was a challenge to a New York state income-tax credit for private and religious school expenses. *Mueller* attacked a Minnesota income-tax deduction for public, private and religious school expenses.

If petitioner's interpretation of the Tax Injunction Act is correct, neither this Court nor the lower courts had subject-matter jurisdiction in either *Mueller* or *Nyquist* since these cases unquestionably involved aspects of the administration of state tax laws, and both also concerned tax "assessments," as petitioner would define that term. Such a lack of subject-matter jurisdiction would not have been waivable by the parties.[12] Yet none of the lawyers for

[12] *See, e.g.*, WRIGHT, ET AL., *supra* § 4237 (Tax Injunction Act "withdraws jurisdiction . . . and, as a jurisdictional limitation, it is not waivable"); FALLON, ET AL., *supra* 13-14 n. 9 (application of Act is "'jurisdictional' and hence nonwaivable.")

the states in either case suggested a lack of jurisdiction at any level, nor did any of the judges or Justices who participated in the five separate adjudications that took place in the two cases. This omission is especially striking with regard to *Mueller*. The Court's opinion there was written by then-Justice Rehnquist less than two years after he wrote the Court's opinion in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). The *Fair Assessment* opinion contained a comprehensive analysis of the history, purposes and scope of the Tax Injunction Act. It is perhaps theoretically possible that, despite the Court's *Fair Assessment* opinion in 1981, everyone involved in *Mueller* in 1983 simply forgot about or ignored the lack of subject-matter jurisdiction. The much more likely explanation is that no one involved in *Mueller* (including the state defendant) believed that there was any basis for contending (as petitioner and *amici* now contend) that the Tax Injunction Act or comity principles precluded federal jurisdiction over a constitutional attack on a tax credit.

Petitioner's reading of the Tax Injunction Act would have significance beyond Establishment Clause cases. In *Griffin v. Prince Edward County*, *supra*, *aff'g Allen v. County School Bd.*, 198 F. Supp. 497 (E.D. Va. 1961), the federal district court was faced with Virginia's persistent attempts to avoid public-school racial desegregation after *Brown v. Board of Education*. One component of this resistance was the county's[13] allowance of property-tax credits for contributions to racially-segregated private

[13] The Tax Injunction Act applies to federal suits challenging the validity of county and local, as well as statewide, taxes. *See* WRIGHT, ET AL., *supra*, § 4237.

schools. The district court enjoined the county from permitting taxpayers to claim those tax credits. Petitioner and his *amici* contend that such relief was beyond the jurisdiction of the district court. In an opinion by Justice Black, however, a unanimous Court held that the district court's injunction against "giving tax credits" was both "appropriate and necessary." *Griffin*, 377 U.S. at 233. The Court also had "no doubt of the power of the [district] court" to enjoin county officials from "giving tax exemptions ... to enforce the discontinuance of the county's racially discriminatory practices." *Id.* at 232-233. Petitioner and his *amici* disagree.

Prior to the present case,[14] the courts of appeal had uniformly rejected applying the Tax Injunction Act to litigation merely because it was tax related. For example, in *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986), the district court had ruled, as petitioner contends, that the Act "applies to any federal litigation touching on the subject of state taxes." Judge Easterbrook's opinion for the Seventh Circuit concluded, however, that

> neither the language nor the legislative history of the statute supports this interpretation. The text of § 1341 does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise additional taxes. The legislative history ... shows that § 1341 is designed to ensure that federal courts do not interfere with states' collection of taxes. ...

[14] One week after the petition for certiorari in this case was filed, a panel of the Fifth Circuit adopted petitioner's position, noting that its decision was inconsistent with the Ninth Circuit decision here. *ACLU Found. of Louisiana v. Bridges*, 334 F.3d 416 (5th Cir. 2003). *Bridges* is inconsistent with prior Fifth Circuit cases. See discussion of *Appling County* and *Hargrave* at pages 24-25. *See also* the discussion of *Bridges* at page 31.

> There was no articulated [congressional] concern about federal courts' flogging state and local governments to collect additional taxes.

Id.

To the same effect is Judge Friendly's opinion for the Second Circuit in *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975), observing that the "context and the legislative history" of the Tax Injunction Act

> lead us to conclude that, in speaking of "collection," Congress was referring to methods similar to assessment and levy, e.g., distress or execution . . . that would produce money or other property directly. . . . Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed on them.

Id.

Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980), is a case analytically identical to the present case. Plaintiff there (a county and individual citizens and taxpayers) brought suit in federal district court challenging a state tax exemption claimed by the defendant electric authority on a nuclear power plant located in the county. Plaintiffs' challenge involved both defendant's "bottom-line tax liability" and an "aspect of state tax administration." Under petitioner's proposed new interpretation, therefore, the district court had no subject matter jurisdiction. The Fifth Circuit, however, affirmed the district court's holding that the Act "is inapplicable to the present action because it seeks not to inhibit the collection of taxes, but to require the collection of additional taxes." *Id.* at 1303-04. *Appling County* was subsequently relied on by the Fifth Circuit in *Hargrave v.*

McKinney, 413 F.2d 320, 326 (5th Cir. 1969), where the court, in rejecting an application of the Tax Injunction Act, noted "the myriad of cases holding generally that Section 1341 should be applied so as to protect the integrity of the state treasury." And see *In re Jackson County*, 834 F.2d 150, 151 (8th Cir. 1987), a school desegregation case in which the court explained that the Tax Injunction Act "has been held to be inapplicable to efforts to require collection of additional taxes, as opposed to efforts to inhibit the collection of taxes."

Without exception district courts have, prior to this case, held the Tax Injunction Act inapplicable to constitutional challenges to state tax credits. In *Moton v. Lambert*, 508 F. Supp. 367 (N.D. Miss. 1981), parents of black children attending public schools in Mississippi sued county and municipal taxing authorities to prevent them from granting sales or property taxes exemptions to private schools practicing racial discrimination in the selection of students or faculty. The district court held the Tax Injunction Act inapplicable:

> It has long been established by the Fifth Circuit . . . that § 1341 does not apply to suits wherein the requested remedy is the collection of additional taxes and not the enjoining or suspension of taxes [citing *Hargrave* and *Appling County, supra*]. Since plaintiffs demand that taxes be collected and not enjoined, it is quite clear that § 1341 does not operate to bar this action.

Id. at 368.

And in *Rojas v. Fitch*, 928 F. Supp. 155, 159 (D.R.I. 1996), plaintiff brought a federal district court suit to challenge the exemption of religious organizations from

the state's unemployment tax. The court held the contention that the Tax Injunction Act applied to be without merit:

> It is clear from the very text of the [Act] that it is not applicable in this instance. The present action is not an action to "enjoin, suspend or restrain" the collection of taxes. In fact, it is quite the opposite. This is, in essence, an action to compel the State of Rhode Island to collect taxes. . . . [B]ecause this action does not seek to enjoin or suspend the assessment and collection of taxes, the Tax Injunction Act does not apply.

Id. at 159-160 (citing *Moton*, 508 F. Supp. at 368).

In district court cases challenging state tax credits or deductions under the Establishment Clause it has been common for state defendants – including defendants from four of the states that have joined an *amicus* brief supporting petitioner in this case[15] – not even to invoke the Tax Injunction Act. *See Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972) (three-judge court) (challenging an Ohio statute providing tax credits for expenses for students attending non-public schools); *Public Funds for Public Schools v. Byrne*, 444 F. Supp. 1228 (D.N.J. 1978) (challenging a New Jersey state income-tax deduction of $1,000 per year for each dependent attending non-public schools); *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978) (three-judge court) (challenging a Minnesota statute permitting a state income-tax deduction of $700 per year for each child attending non-public school); *Rhode Island Fed'n of Teachers v. Norberg*, 479 F. Supp. 1364 (D.R.I. 1979) (challenging a state income-tax deduction for tuition and other expenses at non-public schools); and *Luthens v. Bair*, 788 F. Supp. 1032 (S.D. Iowa 1992) (challenging an Iowa statute authorizing state income-tax deductions or credits for non-public school tuition and textbooks). Although the state defendants did not question jurisdiction in any of those cases, none of these courts had subject-matter jurisdiction if petitioner's and his *amici*'s interpretation of the Tax Injunction Act is correct.

[15] Brief of the States of California, et al., as *Amici Curiae* In Support of Petitioner in No. 02-1809

In the face of this overwhelming body of authority and uniform practice, petitioner and *amici* rely for their proposed new rule on isolated language in opinions of this Court in cases that concerned neither tax credits nor other tax benefits, but that dealt with taxpayer attempts to *avoid* paying state taxes. Petitioner thus invokes the statement in *California v. Grace Brethren Church*, 457 U.S. 393, 409 n.22 (1982) (an action brought by religious schools seeking to prevent the state from requiring them to pay state unemployment taxes), that "the legislative history of the Tax Injunction Act demonstrates that Congress worried . . . about divesting the federal courts of jurisdiction to interfere with state tax administration." Petitioner also relies on the similar statement in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 588 (1995) (an action brought by the Council seeking to prevent the state from imposing taxes on non-resident motor carriers), that "federal law generally will not interfere with administration of state taxes," and the statement in *Arkansas v. Farm Credit Servs. of Cent. Arkansas*, 520 U.S. 821, 826-27 (1997) (a challenge by a federal instrumentality seeking to avoid the payment of state taxes) that the Tax Injunction Act "reflects a congressional concern to confine federal court intervention in state government."

When taken out of context, these statements may seem to support petitioner's contention that the Tax Injunction Act prohibits district courts from entertaining challenges to "any aspect of state tax administration." In context, however, it is clear that the "interference with state tax administration" that the Court was referring to in *Grace Brethren* and *National Private Truck Council*, and the "intervention in state government" that the Court alluded to in *Farm Credit Services*, was interference with a state's ability to collect tax revenue from the plaintiffs, not interference with "any aspect" of tax administration.

The statement from *Grace Brethren* relied upon by petitioner, for example, appears in a footnote explaining why the Tax Injunction Act applies to declaratory judgment as well as injunctive actions. *See Grace Brethren*, 457 U.S. at 409 n.22. That footnote begins with the observation that "[t]o be sure, in enacting the Tax Injunction Act, Congress considered primarily injunctions against state officials because that form of anticipatory relief was *the principal weapon used by businesses to delay or avoid paying taxes.*" *Id.* (emphasis added). The footnote, moreover, appears immediately after the quotation of a statement from *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981), that the principal purpose of the Tax Injunction Act was "'to limit drastically federal district court jurisdiction to interfere with so important a concern as the collection of taxes.'" *Grace Brethren*, 457 U.S. at 408-09. The Court held in *Grace Brethren* that the Act prohibits a declaratory judgment that a state tax is invalid because such a judgment "'may in every practical sense operate to suspend collection of the state taxes until the litigation is ended.'" *Id.* at 408 (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. at 299).

In cases like *Grace Brethren*, *Farm Credit Services* and *LaSalle Nat'l Bank*, in which the Court has held the Tax Injunction Act applicable, it has done so only after carefully examining the factual situation in each case to determine that the federal litigation would, "in every practical sense, operate to suspend the collection of state taxes." *Grace Brethren, supra*. If petitioner's and *amici's* proposed interpretation of the Act were correct, it would have been entirely unnecessary to consider this practical question, for each of these cases unquestionably affected an "aspect" of state tax administration.

C. There Is No Basis For Petitioner's Contention That Settled Law Requires Application Of The Tax Injunction Act In This Case.

In his statement of the Question Presented, Pet. Br. i, petitioner claims that the decision of the Ninth Circuit below is in conflict with decisions in the First, Fifth, Sixth and Eleventh Circuits. In his Brief on the Merits, petitioner cites cases from the First, Fifth and Sixth Circuits, but none from the Eleventh Circuit. The three allegedly conflicting cases petitioner cites are *United States Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979); *ACLU Found. of La. v. Bridges*, 334 F.3d 416 (5th Cir. 2003); and *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988). We assume that the uncited Eleventh Circuit case upon which he relies is *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237 (11th Cir. 1991), a case referred to in the petition for certiorari.

The *Gillis* and *Perez* decisions were not based upon the Tax Injunction Act, but upon principles of comity. Neither case involved a constitutional challenge to a tax credit and neither case supports petitioner's position here.

Gillis and *Perez* are discussed in more detail in connection with our discussion of comity, *infra*, at 42-43 n. 19.

Colonial Pipeline was a federal district court challenge by a public utility, not to a tax credit, but to the validity of Georgia's entire ad valorem tax system. Colonial alleged that property of "centrally assessed" taxpayers, like Colonial, was unconstitutionally assessed by Georgia at a higher rate than the property of non-centrally assessed taxpayers. *Colonial Pipeline Co.*, 921 F.2d at 1239. As a remedy, Colonial requested, among other things, that the state revenue commissioner be enjoined "from approving any county's tax digest from 1989 and onward until the digest is in complete compliance with Georgia constitutional and statutory requirements and the federal constitution." *Id.*

The court of appeals held that Colonial's requested relief "would require a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system," *id.* at 1242, that Colonial's requested relief "boil[ed] down to the [ ] proposition that the federal courts should oversee a redistribution of the ad valorem tax burden in Georgia between centrally-assessed and non-centrally assessed taxpayers through a campaign of systematic reform," *id.*, and that "Colonial is asserting that the ad valorem tax burden in Georgia should be redistributed; that is, it should pay proportionately fewer taxes while non-centrally assessed taxpayers should pay proportionately more," *id.* at 1242 n.8. Such relief, the court concluded, would be "at least as disruptive as the issuance of injunctive relief [against the assessment, levy or collection of ad valorem taxes]." *Id.* at 1243. Colonial's claims were therefore "subject to" the jurisdictional bar of the Tax Injunction Act. The court held, nonetheless, that district court jurisdiction was not precluded because no "plain, speedy, and efficient" remedy

was available to Colonial in state courts. *Id.* at 1243-1246. *Colonial Pipeline* obviously does not conflict with the court of appeals decision below or in any way suggest that district courts have no jurisdiction to consider challenges to tax credits like that in this case.

ACLU Found. of La. v. Bridges, decided after the petition for certiorari was filed in this case, is the only court of appeals decision to have applied the Tax Injunction Act to a situation in any way comparable to that in the present case. *Bridges* involved a challenge to exemptions for religious activities in several Louisiana state taxing statutes. The district court, following established precedent, found that the Tax Injunction Act did not apply because plaintiff was not seeking to restrain the "assessment, levy or collection" of state taxes, but to eliminate unconstitutional tax exemptions. The Fifth Circuit reversed, broadly interpreting the Tax Injunction Act to bar any suit that seeks to have any portion of a state's tax system declared unconstitutional. As authority, however, the court relied entirely upon cases in which granting the relief sought would have directly restricted or diminished tax revenues. The *Bridges* court cited no decisions (other than the conflicting Ninth Circuit decision in this case) involving constitutional attacks on state tax credits. The *Bridges* decision is not only incorrect, it also conflicts with at least two prior Fifth Circuit cases. *See supra* at 24-25.

In sum, it has, for many years, been settled law and established practice in federal courts at every level that the Tax Injunction Act does not preclude federal district court challenges to the constitutionality of state tax credits. Petitioner and *amici* ask the Court to change that rule in order to exempt from original federal jurisdiction all cases dealing with any aspect of state tax law or

administration or, alternatively, all cases affecting the "bottom line" taxes that any taxpayer must pay. This Court should not, however, undo the settled interpretation of a sixty-seven year-old federal jurisdictional statute that has uniformly been applied at all levels of the federal judiciary in complete accordance with the explicit objectives of the Congress that enacted it.[16]

D. Judicial Applications Of The Anti-Injunction Act, 26 U.S.C. § 7421(a), Support The Conclusion That The Tax Injunction Act Does Not Preclude District Court Challenges To The Constitutionality Of State Tax Credits.

In its *amicus* brief in support of petitioner, the United States calls the Court's attention to the fact that the text of the Tax Injunction Act was modeled on the text of a federal statute, enacted in 1867, that bars federal courts from exercising jurisdiction to restrain "the assessment or collection" of any federal tax. 26 U.S.C. § 7421(a). *See* Br. for the United States as *Amicus Curiae* in No. 02-1809, 1. The 1867 statute is commonly referred to as the Anti-Injunction Act. The Solicitor General urges the Court to give the Tax Injunction Act the same interpretation as federal courts have given the Anti-Injunction Act. *Id.* at 18-19. Respondents agree that interpretations and applications of the Anti-Injunction Act are relevant in interpreting the Tax Injunction Act. Contrary to the government's

[16] If the established federal jurisdiction over tax-credit challenges has, for some reason, become unduly burdensome to the states, their recourse, like the recourse of the states that, in 1937, prevailed upon Congress to enact the Tax Injunction Act, is to seek ameliorative federal legislation.

position, however, those applications show that constitutional challenges to tax credits are not precluded by either act.

In support of his assertion that the Anti-Injunction Act prohibits district court challenges to the constitutionality of federal tax credits, the Solicitor General cites three decisions of this Court: *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962); *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); and *South Carolina v. Regan*, 465 U.S. 367 (1984). All three of these cases involved efforts by taxpayers to avoid the payment of federal taxes; none involved attacks on tax credits or tax benefits. In *Williams Packing*, plaintiff sought to enjoin the District Director of Internal Revenue from collecting federal social security and unemployment taxes from it. The Court held that § 7421(a) barred the suit:

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.

Williams Packing, 370 U.S. at 7.

Bob Jones Univ. involved a private sectarian college that attempted to enjoin the Internal Revenue Service from revoking a ruling letter, thus exposing the college to federal tax liability. The Court held the suit barred by the Anti-Injunction Act "because an injunction preventing the Service from withdrawing a § 501(c)(3) ruling letter would necessarily preclude the collection of FICA, FUTA, and possibly income taxes from the affected organization as well as the denial of . . . charitable deductions to donors to the organization." *Bob Jones Univ.*, 416 U.S. at 732; *see*

also Alexander v. "Americans United," Inc., 416 U.S. 752 (1974), decided on the same day as *Bob Jones Univ.* and to the same effect. In *South Carolina v. Regan*, 465 U.S. 367 (1984), the state sought to invoke the original jurisdiction of the Court in order to enjoin the Secretary of the Treasury from taxing certain state bonds. The Court held the Anti-Injunction Act inapplicable because "Congress ha[d] not provided the plaintiff with an alternative legal way to challenge the validity of the tax." *Id.* at 373.

In a footnote on the last page of its *amicus* brief, the United States cites a single case, *Haring v. Blumenthal*, 471 F. Supp. 1172, 1177-1178 (D.D.C. 1979), in which, the government says, § 7421(a) "has been applied in circumstances similar to those of the present case." Br. for the U.S. as *Amicus Curiae* 19, n. 10. That case held that an employee of the Internal Revenue Service did not have standing to challenge the tax exempt status of abortion clinics. In dictum the court went on to state that even if plaintiff had standing, § 7421(a) would prevent an injunction action "to challenge tax exemption rulings in favor of other taxpayers." *Haring*, 471 F. Supp. at 1178. As authority for this dictum the court cites *Bob Jones*, *"Americans United"* and *Williams Packing, supra*, none of which involved the situation present in *Haring*.

While the United States invokes this unsupported dictum, it unaccountably fails to inform the Court about the substantial body of federal decisions (in which the United States or the Secretary of the Treasury were parties) holding squarely that the Anti-Injunction Act does *not* apply to suits challenging federal tax credits, exemptions, or deductions. In *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court), for example, plaintiff sued to enjoin the Secretary of the Treasury

from granting tax exemptions to fraternal orders that excluded nonwhites from membership. In holding that the action was not barred by the Anti-Injunction Act, Chief Judge Bazelon stated:

> Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected. Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when "the central purpose of the Act is inapplicable" [citing *Williams Packing, supra,* and other cases]. In the present case, the central purpose is clearly inapplicable.

Id. at 453-454.

In *Tax Analysts and Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974), plaintiffs challenged the legality of a rule which allowed contributors to political candidate committees to avoid the imposition of the federal gift tax on contributions in excess of $3,000. The Secretary of the Treasury sought dismissal under the Anti-Injunction Act. The court held the Anti-Injunction Act inapplicable:

> The language of the statute and its interpretation by the Supreme Court clearly indicates that this provision precludes suits to restrain the assessment or collection of taxes. It has no application to the instant situation in which plaintiffs seek not to restrain the Commissioner from collecting taxes, but rather to *require* him to collect

> *additional* taxes according to the mandates of the law.

Id. at 892 (emphasis in original).

In *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *rev'd on other grounds*, 426 U.S. 26 (1976), health and welfare organizations and indigent persons challenged the tax exempt status of private nonprofit hospitals that did not provide free or below-cost treatment to people unable to pay. The district court granted relief. Before reaching the merits, the court of appeals addressed and rejected the government's contention that the Anti-Injunction Act barred the case:

> It is apparent from a close analysis of the Anti-Injunction Act that it did not contemplate barring actions, such as this, where the litigation did not threaten to deny anticipated tax revenues to the Government.

Id. at 1284.

In *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982), *rev'd on other grounds*, 885 F.2d 1020 (2d Cir. 1989), plaintiffs challenged the constitutionality of granting tax exempt status to religious organizations that campaign for changes in abortion laws. The government's invocation of the Anti-Injunction Act was rejected:

> The majority of the courts that have considered the scope of the Anti-Injunction Act, . . . have declined to interpret its prohibitions as broadly as defendants suggest. The consistent theme in these decisions is that the statute only extends to those actions it expressly refers to and that its effect is to require that taxpayers who object to the payment of taxes pay the assessment and sue for a refund. Persuasive reasoning supports these decisions. Third party suits to compel tax collection as a means to vindicate plaintiffs' rights do not pose the threat of clogging the federal revenue pipeline that taxpayer-sought injunctions would present because third party suits are "few and far between." . . . In light of the clear language of the statute and the strong and compelling authority limiting application of the statute to actions to restrain tax collection, plaintiffs are not barred from proceeding by the Anti-Injunction Act.[17]

Id. at 489 (internal citations omitted).

Of particular interest, in view of the government's reliance on *Haring v. Blumenthal*, *supra*, is the opinion of the District of Columbia Circuit in *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), decided two years after *Haring*. In *Wright*, a mother of children attending Memphis public schools challenged the Secretary of the Treasury's extension of tax exemptions to private schools that operated on a racially discriminatory basis. The Anti-Injunction Act

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[17] *See also Apache Bend Apartments, Ltd. v. United States*, 702 F. Supp. 1285 (N.D. Tex. 1988), *rev'd on other grounds*, 987 F.2d 1174 (5th Cir. 1993). Plaintiffs sought an injunction against enforcement of the Tax Reform Act of 1986 on constitutional grounds. The court rejected the Government's assertion that the action was barred by the Anti-Injunction Act:

> . . . neither the literal meaning of the Anti-Injunction Act or the purposes of the Act are offended by proceeding to the merits on this case. This is not a suit which seeks to restrain the assessment or collection of taxes. Plaintiff does not request that taxes not be assessed against them or any other taxpayer. Nor do plaintiffs seek to prohibit taxes from being collected against them or any other taxpayer.

Id. at 1294.

was not invoked by the Secretary. In reaching the merits of plaintiff's tax exemption challenge, however, then-Judge Ginsburg raised the issue herself. She observed that:

> A suit to restrain the allowance of tax benefits falls outside the literal reach of § 7421(a). Moreover, cases of this nature, ultimately raising non-frivolous constitutional objections to IRS action, are "few and far between"; they do not threaten large interference by "public interest" litigants with the administrative process of collecting taxes.

Id. at 836 n.52.

Also relevant to the meaning of § 7421(a) are a group of cases holding the Anti-Injunction Act inapplicable to tax related challenges, other than challenges to tax credits or exemptions, that do not threaten the collection of federal taxes. *See Marcello v. Regan*, 574 F. Supp. 586 (D.R.I. 1983) (§ 421(a) inapplicable to suit challenging the validity of statute under which the United States intercepts tax refund checks of persons delinquent on child support payments and sends checks to the state); *Coughlin v. Regan*, 584 F. Supp. 697 (D. Maine 1984) (refund interception case); *Sorenson v. Sec'y of the Treasury*, 752 F.2d 1433 (9th Cir. 1985) (same); *Swaney v. Sec'y, United States Dep't of Educ.*, 664 F. Supp. 172 (D. Del. 1987) (same); *Sea-Land Serv., Inc. v. United States*, 622 F. Supp. 769 (D.N.J. 1985) (§ 7421(a) does not bar suit by maritime employer seeking protection from liability for garnishment of wages of employees to satisfy tax liability).[18]

[18] Cases involving the Declaratory Injunction Act (28 U.S.C. § 2201) are also relevant. That Act authorizes federal courts to grant declaratory judgments "except with respect to Federal taxes." While the language of this provision is broader than the language of the

(Continued on following page)

The United States has frequently asserted that the Anti-Injunction Act bars jurisdiction over challenges to tax credits and similar tax benefits. Those assertions have been rejected. Contrary to the Solicitor General's assertion, the Anti-Injunction Act plainly has *not* been applied to preclude district court jurisdiction over suits attacking the constitutionality or legality of federal tax credits, exemptions or similar federal tax benefits.

II. PRINCIPLES OF FEDERAL-STATE COMITY DO NOT DEPRIVE THE DISTRICT COURT OF SUBJECT-MATTER JURISDICTION.

A. Comity Precludes Federal Jurisdiction Only When A State's Ability To Collect Tax Revenue Is Directly Threatened.

This Court has, on two occasions, held that equity practice or comity principles precluded original federal district court jurisdiction over litigation related to state taxes. Petitioner relies on these cases to argue that comity

Anti-Injunction Act, a number of cases have held that a tax related lawsuit that is not barred by the Tax Injunction Act will not be barred by the Declaratory Judgment Act. *McGlotten, supra, Tax Analysts, supra, Eastern Kentucky Welfare, supra.* A number of cases hold that the tax-suit exemption provision of the Declaratory Judgment Act does not bar a lawsuit just because an aspect of tax administration is involved. *Hoye v. United States*, 109 F. Supp. 685 (S.D. Cal. 1953) (City's challenge to a tax levy on money owed to a City employee not barred by Declaratory Judgment Act); *Joslin v. Sec'y of Dep't of Treasury*, 616 F. Supp. 1023 (D. Utah 1985) (Attorney's challenge to regulations governing standards of lawyers who prepare opinions on tax shelter offerings not barred by Declaratory Judgment Act); *Dominion Trust Co. of Tennessee v. United States*, 786 F. Supp. 1321 (M.D. Tenn. 1991) (Declaratory Judgment Act did not bar an interpleader action by a trustee against the United States seeking a determination of the trustee's duty to file federal and state income tax returns).

should similarly preclude federal jurisdiction here, even if the Tax Injunction Act does not. Pet. Br. 26-29. The opinions in the two cases demonstrate, however, that the Court has used comity, as it has applied the Tax Injunction Act, to preclude federal court jurisdiction only when a district court is asked to stop a state from collecting tax revenue.

The first of the Court's comity cases was *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). The plaintiffs there sought a federal declaratory judgment that Louisiana's unemployment compensation tax, as applied to employees engaged in dredging navigable waterways, was pre-empted either by the federal government's power over navigation or by federal Social Security law. Both the district court and the court of appeals accepted jurisdiction, held the Louisiana tax to be constitutional, and dismissed plaintiffs' complaint on the merits. *Great Lakes Dredge & Dock Co. v. Charlet*, 43 F. Supp. 981 (E.D. La. 1942), *aff'd*, 134 F.2d 213 (5th Cir. 1943). This Court granted certiorari and affirmed on the ground that the lower courts should have exercised their equitable "discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." 319 U.S. at 298.

Chief Justice Stone's opinion for the Court observed that plaintiffs sought to use their federal suit "as a barrier to the collection" of the Louisiana tax, *id.* at 296, and explained that federal equity courts "will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy," *id.* at 297. Because plaintiffs sought only a declaratory judgment and did not seek "an injunction or other coercive relief," the Court recognized that the Tax Injunction Act might not be applicable. The policy of the Act, however, was directly implicated because declaratory relief might "in every practical sense

operate to suspend collection of the state taxes until the litigation is ended." *Id.* at 299. *Great Lakes* obviously has no application to litigation challenging a tax credit.

The Court's other comity decision, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), is equally clear in resting on the Court's decision on the fact that the federal relief requested would have directly interfered with the collection of state taxes. The plaintiff Missouri taxpayers were owners of newly-improved property. They alleged that the county's assessors and their supervisors, as well as the state's Director of Revenue and state tax commission members, had deprived them of equal protection and due process by assessing their property at 33½% of value, while assessing properties without new improvements at 22% of value. Plaintiffs' federal suit sought compensatory damages for the increased taxes caused by the over-assessments, plus punitive damages of $75,000 from each defendant.

In an opinion by then-Justice Rehnquist, the Court held that principles of comity precluded the federal damage suit, even if the Tax Injunction Act "standing alone, would [not] require such a result." 454 U.S. at 107. The Court's opinion explained that, prior to the enactment of the Tax Injunction Act, cases like *Matthews v. Rodgers*, 284 U.S. 521 (1932), counseled federal court restraint when asked to "'enjoin the collection of a state tax.'" *Fair Assessment*, 454 U.S. at 108 (quoting *Rodgers*, 284 U.S. at 525 n.5). The Court had followed a comity "'policy of federal non-interference with state tax collection. . . .'" The Tax Injunction Act was a reflection of this policy. The federal court suit in *Fair Assessment* was precluded by comity because it would be "no less disruptive of Missouri's tax system than would the historic equitable efforts to

enjoin the collection of taxes." *Id.* at 113. Respondent state officials, "faced with the prospect of personal liability to numerous taxpayers, not to mention the assessment of attorneys fees . . . would promptly cease the conduct found to have infringed petitioners' constitutional rights, whether or not those officials were acting in good faith. In short, petitioner's action would 'in every practical sense operate to suspend collection of the state taxes. . . .'" *Id.* at 115 (quoting *Great Lakes*, 319 U.S. at 299). WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4244, similarly explains that comity principles have been used "when the exercise of jurisdiction by the federal court would . . . interfere with the collection of state taxes." It notes that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."

The Court's opinion in *Fair Assessment* recognized that Congress, in enacting 42 U.S.C. § 1983, "cut a broad swath" giving a federal cause of action "to prisoners, taxpayers, or anyone else who was able to prove that his constitutional or federal rights had been denied by any State." 454 U.S. at 103-04. *Fair Assessment* holds that comity principles limit this jurisdiction only where a district court is asked to stop or suspend a state's ability to collect tax revenue. The present case plainly raises no such concerns.[19]

[19] The district court below cited the Sixth Circuit's decision in *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), and the Ninth Circuit's decision in *Ashton v. Cory*, 780 F.2d 816 (9th Cir. 1986), as support for the application of comity principles in this case. That reliance was misplaced. *Ashton*, a suit to declare a state tax pre-empted by federal law, applied the Tax Injunction Act, not comity principles. It correctly read the Act as precluding "federal court interference with state revenue collection procedures." 780 F.2d at 822.

(Continued on following page)

B. Relief In This Case Would Not Otherwise Unduly Intrude On State Officials.

Petitioner's brief suggests that the exercise of federal jurisdiction here would result in an intolerable level of intrusion into state affairs. The "parade of horribles"

Gillis applied comity principles to preclude federal jurisdiction in a case challenging the entire ad valorem tax system of the state of Kentucky. The court of appeals noted that, if the plaintiffs had prevailed in *Gillis*, "the district court would [have been] forced to issue a declaratory judgment finding that virtually all property owners in the state of Kentucky had been deprived of their right to equal protection under the United States Constitution by the manner in which petitioners administered the state tax system." 836 F.2d at 1008. The *Gillis* court concluded that, in these circumstances, "the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax." *Id.* *Gillis* thus explicitly relies on the presence of the same revenue-preclusive factors that this Court recognized in *Fair Assessment* as the proper basis for the application of comity principles.

United States Brewers Ass'n v. Perez, 592 F.2d 1212 (1st Cir. 1979), is the First Circuit case that petitioner refers to in claiming, in his statement of the Question Presented, that a conflict in the circuits exists regarding the issues in this case. *Perez* was a suit brought by mainland United States beer producers and their trade association "to restrain Puerto Rican officials from collecting an increase in the internal revenue tax on beer" imposed by a then-recent Puerto Rican statute. 592 F.2d at 1213. In the alternative, plaintiffs sought to enjoin defendants from exempting small (and local) beer producers from the tax increase. The court of appeals held that the first claim for relief "clearly constitutes relief proscribed by the Butler Act [48 U.S.C. 872]," *id.* at 1214, an analog to the Tax Injunction Act prohibiting the District Court for Puerto Rico from considering any "suit for the purpose of restraining the assessment or collection of any tax enjoined by the laws of Puerto Rico," 48 U.S.C. § 872. With regard to the second claim for relief, the court observed that plaintiffs there were asking the court to impose a new tax upon the small local brewers – a tax that the Commonwealth had not enacted. That situation is not involved in this case.

presented by petitioner reflects basic misunderstandings about the nature of this case.

Petitioner insists that the Court must protect against "federal court interpretation of state tax law." Pet. Br. 21. Respondents, however, have not requested that the district court interpret any state law – there is no disagreement as to the interpretation of A.R.S. § 43-1089, only about whether, as applied, it violates the federal constitution.

Petitioner maintains that if the court of appeals decision is affirmed, taxpayers, like respondents, "who do not want to go through the normal state tax [refund] proceedings" would engage in "clever pleading" and "jurisdictional gamesmanship" by going to the federal court, obtaining an order invalidating a tax credit or deduction allowed to other taxpayers, then "us[ing] the judgment as the basis for a tax refund claim in a state court proceeding." Pet. Br. 24. A taxpayer, however, could not use a judgment invalidating a tax credit claimed by other taxpayers in order to demand a refund of his or her own taxes.

Petitioner complains that this suit might "adversely affect state revenue" because the state might choose to remedy the constitutional infirmity in the current Arizona tax credit by applying the credit to public schools as well as to private schools. Applying state tax revenues to state public schools, however, does not reduce state revenues. Moreover, were a district court to hold a state tax credit unconstitutional for under-inclusiveness (as, for example, would be the case if a tax credit were afforded to male but not female taxpayers) the court would not in any sense prevent the state from collecting tax revenue. In response to the court's decision, the state could choose to extend the credit to all taxpayers, but it could also choose to eliminate

it for everyone. The revenue-protective purpose of the Tax Injunction Act is not implicated in that situation.

Petitioner appears to misunderstand the fundamental difference between a suit that asks a federal court to invalidate a state tax *credit*, and one that seeks invalidation of a state *tax*. To use the example given by petitioner in his brief (Pet. Br. 23) there is an enormous practical difference to the state between (1) a federal suit seeking to invalidate a state tax on dividends received from out-of-state corporations, and (2) a federal suit seeking to invalidate a provision excluding the dividends of in-state corporations from a state tax on dividends. The relief sought in the first suit would prevent the state from collecting taxes and is barred by the Tax Injunction Act. The relief sought in the second suit, however, would not interfere with the collection of state tax revenue. The fact that both suits may substantively rest on the same dormant commerce clause claim is irrelevant to the application of either the Tax Injunction Act or comity principles. Application of the Act and comity depend on the *relief* sought in the federal suit, not on the substantive basis for arguing that the state law is unconstitutional. The Act and comity prevent federal relief that interferes with the collection of tax revenue; they do not immunize state tax laws from original district court jurisdiction.

Finally, petitioner worries that it will have to allow "the parties to the [Arizona] state litigation" (in which the credit was upheld against a facial attack) to use the credit, but not allow "the parties to the federal ruling" to use the credit. Pet. Br. 29. Petitioner forgets that no taxpayers seeking to use the credit were parties to the state-court facial challenge – the plaintiff taxpayers in that case sought to invalidate the credit, not to use it. Similarly,

none of the plaintiff taxpayers in this case will be harmed if they are not "allowed" to use the credit – because that is exactly the relief they request.

Petitioner's version of "comity" would prevent the district courts from interfering with any aspect of the "fiscal operations" of a state, whether or not the state's ability to collect tax revenue is involved. Unless the state's ability to collect revenue is directly threatened, however, there is no principled reason to distinguish between the interference caused by federal suits regarding state taxation and federal court interference on constitutional grounds with the administration of other state programs, such as state welfare programs, *see, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970), or educational systems, *see, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). All of these programs impact state "fiscal operations" and involve important state policies. As this Court explained in *Fair Assessment in Real Estate Ass'n v. McNary*, *supra*, intrusion into the administration of state affairs is "undoubtedly present in every § 1983 claim." 454 U.S. at 114.

Respondents' prayer for relief in the district court sought only (a) injunctive relief prohibiting petitioner from allowing taxpayers to use the unconstitutional tax credit in the future; (b) a declaration that the credit is unconstitutional; and (c) an order directing petitioner to inform STOs in possession of tax-credit revenues that such funds must be paid into the state general fund, rather than distributed as scholarships. J.A. 15. Petitioners do not seek to reopen any past tax years, or require the return of any funds that have already been awarded as scholarships. Respondents' prayer for injunctive relief can be satisfied by simply eliminating the STO tax credit from the credits that can be claimed in future years on Arizona

Form 301. *See* Arizona Resident Personal Income Tax Return, lines 29 and 30, J.A. 56. If granted, the relief requested in this case will impose no undue burden on the state or the administration of its tax system.

III. STATES AND LOCAL GOVERNMENTS SHOULD NOT BE EMPOWERED TO FRUSTRATE ORIGINAL FEDERAL JURISDICTION BY EFFECTUATING UNCONSTITUTIONAL POLICIES THROUGH TAX CREDITS.

Griffin v. Prince Edward County, *supra*, is illustrative of an era when some states and local governments, in defiance of the Constitution and this Court's decision in *Brown v. Board of Education*, sought to use state tax credits to prevent racial desegregation of public schools. In *Griffin*, the county allowed property taxpayers to divert property-tax revenues to support segregated private schools. The district court enjoined that practice and this Court unanimously affirmed.

Under the overbroad interpretation of the Tax Injunction Act and comity principles used by petitioner, the United States, and other *amici* supporting petitioner, the district court would not have had jurisdiction to issue its injunction in *Griffin*. The black children who were the plaintiffs in *Griffin* would have been required, instead, to seek relief through Virginia's state court system, with recourse to this Court's jurisdiction available on certiorari only after all state-court remedies were exhausted. Had that been the law, it would not have been surprising if the unconstitutional credits – and the resulting massive state financial support for white-only schools – had remained in effect for several years. The Tax Injunction Act was never intended by Congress to have such a drastic negative

impact on the ability of the federal courts to protect constitutional rights.

The state tax-credit program involved in this case is not wholly dissimilar from the tax-credit program invalidated in *Griffin*. In *Zelman v. Simmons-Harris*, *supra*, this Court upheld a state school-voucher program to help poor children in substandard Cleveland, Ohio, schools attend non-public schools of their choice. The Court described the Cleveland program as open, on a non-discriminatory basis, to children attending any participating non-public school in Cleveland, or any participating public school in the surrounding area. The constitutionality of a state or local school-voucher program that significantly departs from the *Zelman* model – for example by giving preference in awarding vouchers to children attending religious schools – would clearly be challengeable through the invocation of original federal jurisdiction under 42 U.S.C. § 1983.

Arizona has established a program to give state financial support for tuition at non-public schools. It has done so through state income-tax credits, rather than through state-issued vouchers. Arizona's program differs in important respects from the program upheld in *Zelman*. It is not limited to poor children; it applies to children already attending private school and to children living in school districts with excellent public schools, as well as to children attending substandard schools; it does not limit the size of the scholarships that may be awarded or the amount of the tuition that non-public schools accepting scholarship students may charge; and, perhaps most importantly, it does not guarantee free parental choice. Under the Arizona program, scholarships may be awarded on the basis of the religion of the scholarship applicant

and on the basis of the religious denomination of the school the student wishes to attend.

If the Arizona program were a state-voucher program, state taxpayers objecting to the program on constitutional grounds could clearly invoke the original jurisdiction of the federal courts to determine whether these differences favoring religious-school education have constitutional significance. Petitioner and his *amici* argue, however, that because Arizona uses state tax credits as the funding mechanism, rather than state vouchers, its program is immune from challenge in federal district court. The Tax Injunction Act and its underlying comity principle were never intended to authorize that frustration of original federal jurisdiction.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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December 19, 2003

Calendar No. 1074

75TH CONGRESS, *1st Session* } SENATE { REPORT No. 1035

AMENDING THE JUDICIAL CODE

JULY 22 (calendar day, AUG. 2), 1937. –
Ordered to be printed.

Mr. CONNALLY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1551]

The Committee on the Judiciary, to whom was referred the bill (S. 1551) to amend section 24 of the Judicial Code, after consideration thereof, report the bill favorably to the Senate with the recommendation that it do pass.

S. 1551 amends section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the Untied States over suits relating to the collection of State taxes. The bill reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy,

and efficient remedy may be had at law or in equity in the courts of such State."

SEC. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed.

This legislation does not introduce a new principle, since the Congress has passed statutes of similar import. It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the states and their various agencies to survive while long-drawn-out tax litigation is in progress. If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation.

The existing practice of the Federal courts in entertaining tax-in-junction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax

money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

The attorney general of each of the following States has seen fit to urge passage of this bill: Alabama, California, Florida, Idaho, Illinois, Louisiana, Minnesota, Missouri, Montana, New Jersey, Oklahoma, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wyoming.

It should be emphasized that the bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy, and efficient remedy at law or in equity in the courts of the State. A full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases.

The propriety of this kind of legislation was fully discussed by the Senate Judiciary Committee when the so-called Johnson Act of May 14, 1934, S. 752, Public, No. 222, was favorably reported and subsequently passed by the Congress.

The report on the Johnson bill pointed out that the continuance of the unjust discrimination between citizens of the State and foreign corporations doing business in such State has been the cause of much controversy. The controversies arising out of the use of the injunctive process in State tax cases would be eliminated by the passage of this bill.

The question of the constitutionality of this type of legislation was also discussed in the report on the Johnson bill, which pointed out decisions of the Supreme Court which removed any question of the right of Congress to limit jurisdiction of Federal district courts in matters of this kind. There being no question of the constitutional right of the Congress to enact such legislation, the only remaining question is that of the propriety and wisdom of such legislation. The district courts of the United States derive their jurisdiction wholly from the authority of Congress, as was clearly pointed out in *Kline v. Burke Construction Company* (260 U.S. 226 (1922)). In that case the Supreme Court held that Congress might give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. As far back as 1799 the case of *Turner v. Bank of America*, Mr. Justice Chase, speaking for the Supreme Court, laid at rest any question of the right of Congress to enact this sort of legislation.

Since the Johnson Act was passed its constitutionality has been upheld in an opinion in the United States District Court of Mississippi, which reviewed at length the constitutional basis for such legislation in the case of *Mississippi Power & Light Company v. City of Jackson* (9 Fed. Supp. 564).

A contemplation of the wisdom and desirability of this sort of legislation rising out of the compelling needs of many States for a more prompt disposition of tax controversies of the character referred to, impels us to recommend the prompt passage of S. 1551.

1/13/04

(16)

No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN. Arizona taxpayer,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY ON THE MERITS

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ARGUMENT

I. The Plain Language of the Tax Injunction Act Prohibits This Challenge to Arizona's Tax Credit.

The Court can easily begin and end this case with the plain language of the Tax Injunction Act. By its express terms, the Act prohibits federal district courts from interfering not only with the "collection" of state taxes, but also with the "assessment" of such taxes. And the plain meaning of the word "assessment" refers to the process of calculating a taxpayer's ultimate tax liability – a process that includes the state tax credit at issue here. *See* Pet. Br. at 12-14.

Respondents have no plausible argument to explain why the term "assessment" in the Tax Injunction Act should not be given its ordinary meaning. Their best effort comes in the tentative suggestion that "[i]f the term 'assessment' is to be applied [here] in the same way as it is ordinarily applied to property taxes," then "'assessment' . . . would appear" to apply to only above-the-line calculations of taxable income. Resp. Br. at 15-16. But "assessment" as used in the Tax Injunction Act refers not to an assessment of property or income, but to an "assessment of . . . any tax." 28 U.S.C. § 1341. Further, Congress should be presumed to have used the term "assessment" in that Act the same way it uses the term in other federal statutes. As the Solicitor General details, "assessment" is used consistently in the Internal Revenue Code to mean the government's determination of a taxpayer's ultimate liability. U.S. Amicus Br. at 11-12. Respondents do not explain why Congress would have intended "assessment" to have a different meaning in the Tax Injunction Act than it has in other parts of the federal code, especially in the Internal Revenue Code.

Perhaps recognizing that "assessment" is only sensibly read to refer to the process of determining ultimate tax liability, Respondents now advance a new argument, one not adopted below: even if the Arizona tax credit is a component of an "assessment," nothing about their federal-court challenge "enjoin[s], suspend[s] or restrain[s]" that assessment. Resp. Br. at 16. That argument makes no sense. Respondents' own lawsuit requests that the district court "enjoin" the State from applying its tax credit in making "assessments" of state tax. Joint App. 15. If Respondents are successful, then they will have "enjoined" and "restrained" the State from making the "assessment . . . under State law." 28 U.S.C. § 1341; *see also Webster's New Int'l Dictionary* 2125 (2d ed. 1934) (giving one definition of "restrain" as "to hold back from acting, proceeding, or advancing, either by physical or moral force, or by any interposing obstacle" as well as other consistent definitions).[1]

Nor does *Jefferson County v. Acker* support Respondents' position that a suit to enjoin a tax credit does not restrain the State's assessment of taxes. 527 U.S. 423 (1999) (discussed in Resp. Br. at 15-16). *Jefferson County* involved a county's lawsuit to collect taxes from federal

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[1] A taxpayer's involvement in the assessment of income tax does not eliminate the State's involvement in the assessment process. Although in most cases taxpayers initially determine their tax liability by filling out and filing their tax forms, the State assures compliance by checking the self-assessment. *See* Ariz. Rev. Stat. § 42-1108(A) ("the department [of revenue] may examine any return . . . to determine the correct amount of tax"). Moreover, Respondents request the district court to order Petitioner to disallow tax credits, which thus would require the State to examine each self-assessment.

judges that the county filed in state court and the judges removed to federal court. 527 U.S. at 423. In *Jefferson County*, the Court applied the plain language of the Tax Injunction Act and concluded that "a suit to collect a tax is surely not brought to restrain state action, and therefore does not fit the Act's description of suits barred from federal district court adjudication." *Id.* at 424. Here, in contrast, Respondents' lawsuit specifically requests the district court to enjoin state action – that is, to enjoin the State from applying its state tax credit law in making assessments of state tax.

In essence, Respondents' position is that the Tax Injunction Act applies only when a federal-court action, if successful, would deprive the state of tax revenue – that is, when a suit seeks to enjoin the *collection* of state taxes. Resp. Br. at 19-20. If Congress had wanted to enact that statute, it would have been easy enough; it could have deleted the words "assessment" and "levy" from the Tax Injunction Act. But that is not what Congress did, and Respondents cannot write the word "assessment" out of the Tax Injunction Act.[2]

Respondents cannot make sense of the statutory language in a manner that conforms to their position. According to Respondents, the term "assessment" refers only to above-the-line tax calculations, so that the statute

[2] Respondents wrongly argue that Petitioner attempts to rewrite the Tax Injunction Act in asserting that Congress intended the Act to prevent interference with state tax administration. Resp. Br. at 17. Congress's intent is demonstrated by its use of the words "assessment, levy and collection," which encompasses all three major parts of the state taxation system.

precludes challenges to tax *deductions*, but not to tax credits like the one at issue here. *See* Resp. Br. at 16. But a successful challenge to a tax deduction, like a challenge to a tax credit, may have the result of increasing state revenues – which under Respondents' theory should take it outside the scope of the Tax Injunction Act. And a litigant challenging a tax credit as underinclusive may seek expansion of the credit to other entities – or the court may award that relief – so that Respondents' own reading of the Act would allow federal courts to adjudicate a challenge that could deprive a State of tax revenue. In short, it is impossible to reconcile Respondents' policy arguments about when federal-court interference with state taxation should be prohibited with the actual language of the Tax Injunction Act. That language controls, and it is enough to dispose of this case.

II. The Tax Injunction Act's Legislative History Neither Overrides Nor Conflicts with Its Plain Language.

Respondents attempt to avoid the plain language of the Tax Injunction Act by arguing that its legislative history limits its scope to revenue-protection purposes and therefore does not apply to challenges to state tax credits. Resp. Br. 18-20. It is unnecessary to resort to legislative history because the language of the Act is clear and unambiguous. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989) (resort to legislative history unnecessary where statutory text is clear). Even if the Act's legislative history were relevant, it does not support Respondents' argument that Congress intended to limit its application to lawsuits that stop state revenue collection. While Congress sought, in part, to curtail efforts by out-of-state taxpayers to

avoid paying tax, this history does not limit the application of the Tax Injunction Act to that situation. *See Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.")

Further, Respondents ignore other aspects of the Act's legislative history that show that Congress was also concerned with federal-court challenges that interfered with the States' administration of the core sovereign function of taxation.[3] This Court has repeatedly noted this as an important congressional purpose behind the Tax Injunction Act. For example, in *Arkansas v. Farm Credit Services*, the Court stated:

> Enactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal court intervention in state government, a concern prominent after the Court's ruling in *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment is not in all cases a bar to federal court interference with individual state officers alleged to have acted in violation of federal law.

520 U.S. 821, 826-27 (1997); *see also Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 590-91 (1995)

[3] There are two additional reasons behind the Tax Injunction Act that are discussed in *Aluminum Company v. Department of Treasury*, 522 F.2d 1120, 1124 (6th Cir. 1975). The first reason is a concern that the added expense of litigating in the federal courts might make it financially unsound for the State or a local taxing authority to contest a wealthy corporation's tax liability. The other reason is to relieve congestion in the federal courts by letting state courts settle state controversies. *Id.* (citing S.Rep. No. 1035, 75th Cong., 1st Sess. 1[illegible] (1937) and 81 *Cong. Rec.* 1416-17 (1937)).

("the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation"); *California v. Grace Brethren Church*, 457 U.S. 393, 410 n.22 (1982) ("Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration"); *Tully v. Griffin*, 429 U.S. 68, 73 (1976) (the Tax Injunction Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations"); *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part) (reasons for the Tax Injunction Act include that "federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts").

Respondents argue that the Court's language interpreting the Tax Injunction Act to prohibit interference with the state tax system is taken "out of context." Resp. Br. at 28. Although the Court's Tax Injunction Act cases have generally dealt with lawsuits that sought to interfere with the State's collection of taxes, the Court has never suggested that the plain language of the statute should be ignored in favor of a single purpose of the Act. To the contrary, the Court has held that the "statutory text 'is to be enforced according to its terms' and should be interpreted to advance 'its purpose' of 'confin[ing] federal-court intervention in state government.'" *Jefferson County*, 527 U.S. at 433 (quoting *Farm Credit Servs.*, 520 U.S. at 826-27).

The Tax Injunction Act's federalism purpose is the same purpose underlying the Johnson Act of 1934, 28 U.S.C. § 1342, which prohibits federal-court interference

with orders issued by state administrative agencies to public utilities. *See Grace Brethren*, 457 U.S. at 410 n.22. Respondents suggest that it is inappropriate to rely on the legislative history of the Johnson Act to explain the Tax Injunction Act. Resp. Br. at 17-18 n.10. But this Court itself has looked to the Johnson Act as a guide for interpreting the Tax Injunction Act – which is hardly surprising, given the fact that Congress itself expressly relied on the purpose underlying the Johnson Act when it enacted the Tax Injunction Act. *Grace Brethren*, 457 U.S. at 410 n.22; *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 513-14 (1981) ("[a]s Senator Bone made clear, '[m]ost of the arguments which were used in support of the Johnson Act . . . apply in like manner' to the Tax Injunction Act") (quoting 81 *Cong. Rec.* 1416 (1937)). Thus, Congress's reliance on the congressional purpose for enacting the Johnson Act demonstrates that, in enacting the Tax Injunction Act, it was concerned with federal interference with a core sovereign function of state government as well as interference with the State's ability to collect revenue.

III. The Tax Injunction Act's Plain-Language Meaning Is Entirely Consistent with This Court's Precedent and with Many Lower Court Decisions.

Apparently recognizing the weakness of their textual and legislative history arguments, Respondents rely heavily on decisions of this Court adjudicating the merits of cases initiated in a federal district court that challenge constitutional state tax credits or deductions: *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Mueller v. Allen*, 463 U.S. 388 (1983); and *Griffin v. Prince Edward County School Board*, 377 U.S.

218 (1964). Resp. Br. at 21-23. Respondents acknowledge, however, that the parties in these cases never raised the Tax Injunction Act and that the Court did not discuss the Act. It is well established that this Court does not consider itself bound by prior sub silentio holdings "when a subsequent case finally brings the jurisdictional issue" before it. *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989) (same); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (same). Moreover, the Tax Injunction Act allows federal jurisdiction if there is no plain, speedy or efficient remedy in the state courts. The Court may therefore presume that the parties' failure to raise the issue in *Nyquist, Mueller,* and *Griffin* was due to the inadequacy of the state court remedies. *See De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 810 n.5 (1997) (Court presumed that lower court correctly determined that there was not an adequate state remedy and therefore no bar under the Tax Injunction Act given the State's "active participation in nearly four years of federal litigation with no complaint about federal jurisdiction"). Therefore, *Nyquist*, *Mueller*, and *Griffin* provide no assistance in determining whether the Tax Injunction Act applies to state tax credits.

Contrary to Respondents' assertion, the plain-language reading of the statute to cover challenges to tax credits is not a novel one; or one that breaks with a line of lower court authority. Many lower courts – including the district court below – have held that challenges that may result in "more" revenue for the State are barred by the Tax Injunction Act and principles of comity because such suits "restrain" or "enjoin" the "assessment" of tax. *ACLU v. Bridges*,

334 F.3d 416, 421-22 (5th Cir. 2003) (determining whether an individual or organization qualifies for an exemption is part of the "assessment" process and therefore a lawsuit seeking invalidation of the exemption is barred by the Tax Injunction Act); *Kraebel v. New York City Dep't of Hous. Pres. and Dev.*, 959 F.2d 395, 400 (2d Cir. 1992) (holding that the Tax Injunction Act barred taxpayer's constitutional challenge to a property tax exemption and abatement scheme); *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242 (11th Cir. 1991) (rejecting the suggestion that a suit that could result in the increase in state tax collections was outside the scope of the Tax Injunction Act because the "requested relief, if granted, . . . would clearly conflict with the principle underlying the Tax Injunction Act that the federal courts should generally avoid interfering with the sensitive and peculiarly local concerns surrounding state taxation schemes"); *In re Gillis*, 836 F.2d 1001, 1005 (6th Cir. 1988) (although the court found it unnecessary to reach the Tax Injunction Act because the suit was barred by the principles of comity, it noted a suit that seeks to enhance state revenues may nonetheless fall within the Act's ban because "the Act is not, by its own language, limited to the collection of taxes"); *United States Brewers Ass'n, Inc. v. Perez*, 592 F.2d 1212, 1215 (1st Cir. 1979) ("[A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations.")

There are of course cases holding to the contrary – most notably, the decision of the Ninth Circuit below. That is presumably why this Court granted certiorari. But Respondents' suggestion that reversal of the Ninth Circuit would run contrary to an "overwhelming body of authority and uniform practice" is without basis.[4]

IV. The Principles of Comity Bar Respondents' Federal-Court Lawsuit Challenging Arizona's Tax Credit.

Respondents attempt to narrow the principles of comity in the same way they do the Tax Injunction Act, insisting that those principles apply only when a tax law challenge "would stop a state from collecting revenue." Resp. Br. 40. But as with the Tax Injunction Act, principles of comity are far more expansive than Respondents would like. Respondents' argument ignores the crucial federalism

[4] Respondents also err in contending that judicial interpretations of the Anti-Injunction Act support the Ninth Circuit's interpretation of the Tax Injunction Act. Contrary to Respondent's suggestions, Resp. Br. 32-37, the principles supporting the Anti-Injunction Act are fully present in cases where the requested relief would *increase* federal tax collections. *See, e.g., Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (recognizing that action to compel a higher tariff would "disturb the whole revenue system of the government.") Moreover, most of the lower-court decisions that Respondents relied on were reversed on other grounds. *See* Resp. Br. 36 (acknowledging that two of the cases were reversed on appeal); *see also Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *rev'd by Allen v. Wright*, 468 U.S. 737 (1984), on standing grounds. Finally, Respondents fail to recognize a crucial distinction between the Anti-Injunction Act and the Tax Injunction Act. In most cases brought by plaintiffs seeking to invalidate federal tax credits or exemptions conferred on other taxpayers, there is no other avenue of relief in federal court and the Anti-Injunction Act does not apply. *South Carolina v. Reagan*, 465 U.S. 367, 378 (1984) ("Congress did not intend the [Anti-Injunction] Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy.") By contrast, it is undisputed in this case that Respondents have an adequate remedy in state court.

underpinnings of the Court's comity decisions and the disruptive effect on state tax administration that is caused by challenges to state tax credits. In *Fair Assessment in Real Estate Association, Inc. v. McNary*, this Court noted that the principles of comity predate the Tax Injunction Act, and found that "the very maintenance of [a lawsuit] would intrude on the enforcement of the state [tax] scheme." 454 U.S. 100, 114 (1981). Thus, while revenue interference clearly falls under the scope of comity, the broader federalism purpose of that doctrine covers all matters that disrupt a state tax system, including challenges to state tax credits.

The common theme throughout this Court's decisions regarding comity is that state tax matters should be heard in state court *unless* those remedies are not "plain, adequate, and complete." *See Fair Assessment*, 454 U.S. at 116; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297 (1943); *Matthews v. Rodgers*, 284 U.S. 521, 525-26 (1932) ("the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States").[5] Consequently, the issue is not whether a state tax challenge will increase or decrease revenue to a State, as Respondents contend, but rather whether the state court system provides an adequate remedy for the challenger. There is no dispute that the Arizona courts clearly provide such a remedy. Resp. Br. 11

[5] In *Fair Assessment*, the Court noted that there is no significant difference between remedies that are "plain, adequate, and complete," as that phrase has been used in articulating the doctrine of equitable restraint based on notions of comity, and those that are "plain, speedy and efficient" as used in the Tax Injunction Act. *Id.* at 116 n.8.

n.7. Thus, the district court correctly dismissed the Respondents' suit under the principles of comity.

Respondents also wrongly argue that their lawsuit seeking a federal court order enjoining the state tax credit will not disrupt Arizona's tax administration. A federal-court ruling that is inconsistent with the Arizona Supreme Court's decision in *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999) and *cert. denied sub nom. Rhodes v. Killian*, 528 U.S. 810 (1999), would be highly disruptive. First, if Petitioner complies with a federal-court order enjoining him from allowing the tax credit for contributions to school tuition organizations (STOs) that contribute to religious schools, Arizona taxpayers who nevertheless contributed to such STOs could file a refund action in state court and that court must follow Arizona Supreme Court precedent. Second, Respondents are wrong that *Kotterman* did not include taxpayers who sought to use the tax credit as parties. Taxpayers who intended to take the Arizona private school tuition credit intervened in the *Kotterman* lawsuit. *See* Pet. for Writ of Cert. *Kotterman v. Killian*, 528 U.S. 921 (1999) (No. 98-1716). Therefore, allowing Respondents to pursue relief in federal court creates a very real possibility that the Arizona Department of Revenue will have to deal with inconsistent adjudications.

The relief that Respondents seek is also inherently disruptive because it could result in a court order prohibiting the State from allowing tax credits for contributions to STOs that give to religious schools, but permitting tax credits to STOs that give to non-religious schools. This relief would create new and onerous administrative burdens on the Arizona Department of Revenue to determine what type of schools the different student tuition

organizations support through their scholarship programs. This relief would also prevent the State from determining conclusively which taxpayers are eligible for the tax credit and which are not until this litigation and any appeals are ended. Respondents' assumption that a lawsuit interferes with the State's tax administration only if, in the end, the State loses revenue ignores the fact that any change in tax law affects tax administration.

Although Respondents acknowledge that the State may remedy an unconstitutional credit in a way that decreases revenues, they inexplicably claim that this does not implicate the revenue-protection purpose of the comity principle. Resp. Br. at 44-45. The parties to lawsuits challenging tax provisions cannot predict the final remedy that will be ordered by the court or adopted by the Legislature. *Cf. Bridges*, 334 F.3d at 421 (noting that "it is not necessarily true that declaring exemptions unconstitutional will result in the State collecting more taxes"). For example, the Arizona Legislature could, in response to a decision striking down the credit as it applies to religious schools, expand the credit by allowing student tuition organizations to distribute monies to public schools.

Because Respondents' lawsuit interferes with Arizona's assessment of state taxes and requests relief that is disruptive to Arizona's tax administration, the Court should affirm the district court's dismissal based on the principles of comity.

V. Congress and This Court Have Entrusted State Courts to Decide Federal Constitutional Issues.

The same theme permeates Respondents' brief and the briefs of their amici: regardless of the Tax Injunction Act language, the Court should construe it (as well as principles of comity) narrowly because otherwise States will be able to "effectuat[e] unconstitutional policies through tax credits," without any meaningful judicial check. Resp. Br. at 47. In their opinion, state courts cannot be trusted to correct federal constitutional violations, which will remain unremedied unless federal district court review is authorized. *See, e.g.*, Br. of Americans United for Separation of Church and State at 13-15. This argument blatantly ignores the very principles of federalism that are fundamental to the Tax Injunction Act and the principles of comity. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.").

By enacting the Tax Injunction Act, Congress has squarely rejected the notion that only federal district courts are capable of deciding federal constitutional issues. *See Rosewell*, 450 U.S. at 515 n.19 (noting that the Tax Injunction Act "embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts, as long as state procedures were 'plain, speedy and efficient' and final review of the substantive claims could be obtained in this Court"); *Grace Brethren*, 457 U.S. at 416-17 ("Carving out a special exception for taxpayers raising First Amendment claims would undermine significantly Congress' primary purpose 'to limit drastically federal district

court jurisdiction to interfere with so important a local concern as the collection of taxes.'") (quoting *Rosewell*, 450 U.S. at 522).

This Court has also repeatedly recognized that state courts have a constitutional obligation to uphold federal law and has expressed its confidence in their ability to do so. *Coeur d'Alene Tribe*, 521 U.S. at 275; *see also Grace Brethren*, 457 U.S. 417 n.37 (rejecting appellees' argument "to the extent that it assumes that the state courts will not protect their constitutional rights"); *Alden v. Maine*, 527 U.S. 706, 755 (1999) (Court is "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States"); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (same). Indeed, Arizona state judges and officers take an oath to uphold the federal constitution. Ariz. Const. art. VI, § 26 (judges); Ariz. Rev. Stat. § 38-231 (officers).

In addition, the Court has recognized that both the Tax Injunction Act and the principles of comity have safeguards that protect federal rights. *See Grace Brethren*, 457 U.S. at 415 n.31. Under the Tax Injunction Act, litigants are entitled to federal-court relief if the state court remedy is not "plain, speedy and efficient." And, under the principles of comity, litigants are entitled to seek relief in federal court if the state-court remedy is not "plain, adequate and complete." Here, Respondents have never contended that their remedy at state law was defective. Indeed, the Arizona Supreme Court took original jurisdiction in *Kotterman* to resolve the constitutional challenge to the tax credit at issue here and this Court denied review of that decision. Respondents' disagreement with the result in *Kotterman* is hardly a sufficient basis to avoid the Tax Injunction Act and principles of comity.

Finally, Respondents fail to address one of the most important safeguards in the Tax Injunction Act: this Court's review of federal issues arising out of state court proceedings. Again, there is no reason to presume that the sound judgment of state officials and review by state courts will not be sufficient to prevent the parade of horribles hypothesized by Respondents and their amici. But should that parade materialize, there is also no reason to assume that this Court will be unwilling or unable to protect federal constitutional rights. Respondents' concerns are entirely unwarranted and should not be the basis for overriding Congress's decision to prevent federal district court interference with the assessment of state taxes.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals for the Ninth Circuit and affirm the district court's dismissal of this matter.

Respectfully submitted,

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No. 02-1809

In the Supreme Court of the United States

J. ELLIOT HIBBS, DIRECTOR,
ARIZONA DEPARTMENT OF REVENUE, PETITIONER

v.

KATHLEEN M. WINN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Tax Injunction Act, 28 U.S.C. 1341, bars an action in federal district court that seeks to enjoin a State from applying a state tax credit in determining and assessing state tax liabilities.

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AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the Tax Injunction Act, 28 U.S.C. 1341, bars an action in federal district court that seeks to enjoin a State from applying a state tax credit in determining and assessing state taxes. The Tax Injunction Act generally deprives the federal district courts of jurisdiction over any action to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" (28 U.S.C. 1341). The Act was expressly modeled by Congress on the text of the similar federal statute that, since 1867, has barred courts from exercising jurisdiction to enjoin, suspend or restrain the assessment or collection of any *federal* tax. 26 U.S.C. 7421(a). Because of the close

similarity of the text and purpose of these two provisions, this Court has expressly linked their interpretation on at least two prior occasions. See *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999); *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 6 (1962). The United States has a substantial interest in the proper interpretation and application of these parallel statutory provisions. For the reasons set forth below, the United States submits that the court of appeals erred in holding that the Tax Injunction Act is inapplicable to suits challenging the validity of state tax credit provisions.

STATUTORY PROVISIONS INVOLVED

1. The Tax Injunction Act, 28 U.S.C. 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

2. 26 U.S.C. 7421(a) provides, in relevant part:

> Except as [otherwise] provided [in the Internal Revenue Code], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

STATEMENT

1. Respondents are Arizona taxpayers. They brought this suit in federal district court against J. Elliot Hibbs, in his official capacity as the Director of the Arizona Department of Revenue. In their suit, respondents claim that an Arizona state income tax

credit violates the Establishment Clause of the First Amendment to the United States Constitution.[1]

Under Ariz. Rev. Stat. § 43-1089 (2002), Arizona taxpayers are permitted to claim a dollar-for-dollar credit against their state income tax liability for contributions that they make to a "school tuition organization." This credit is limited to $500 for an individual taxpayer and to $625 for married taxpayers who file a joint state income tax return. For the credit to apply, the "school tuition organization" to which the contribution is made (i) must be exempt from federal income taxes under 26 U.S.C. 501(c)(3) and (ii) must spend at least 90% of its revenues on education scholarships or tuition grants for children to attend private primary or secondary schools. Pet. App. 12-13.

Respondents allege that these "school tuition organizations" are primarily "religious organizations that restrict their donations to religious non-public schools which in turn, use these funds to promote religious

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[1] Neither the parties nor the courts below addressed whether respondents have "Article III standing" to bring this action in federal court. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). This Court has held that a person who is not subject to a federal tax may have standing to bring a challenge to the tax based on a "specific limitation on the power to tax and spend." *Id.* at 479. A complaint that arises under the Establishment Clause satisfies that standard, for that Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power * * * ." *Flast* v. *Cohen*, 392 U.S. 83, 104 (1968); see *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. at 479. Whether the challenge to the state tax credit in this case falls within the scope of those decisions, or otherwise satisfies the Article III standing requirement (see *Doremus* v. *Board of Education*, 342 U.S. 429, 434-435 (1952)), was not raised or addressed below.

education and worship." Pet. App. 28. Respondents sought a declaration that "the tax credit authorized by § 43-1089 allows state revenues to fund education in a religiously-preferential manner," in violation of the Establishment Clause of the First Amendment to the Constitution. *Id.* at 29. They also sought a preliminary and permanent injunction against any future application of the state tax credit and an order requiring all monies distributed to, but not yet expended by, recipient "school tuition organizations" to be "return[ed] to the state's general fund." *Id.* at 13-14, 29.

2. The district court dismissed respondents' suit. Pet. App. 27-36. The court noted that the Tax Injunction Act, 28 U.S.C. 1341, expressly bars federal district courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax under [S]tate law where a plain, speedy and efficient remedy may be had in the courts of such state." Pet. App. 29-30 (quoting 28 U.S.C. 1341). The court held that respondents' request to enjoin the future application of this state tax credit in making assessments of state income taxes is expressly proscribed by the plain text of this statute. Pet. App. 30-31. "By preventing restraints on both the assessment and collection of taxes, Congress indicated that the [Tax Injunction Act] is not limited to collection only but was intended to encompass the process that the state uses in its determination of tax liability." *Id.* at 31. The court emphasized that, "when the state offers tax credits to reduce tax liability, the credits become an integral part of the State's assessment of each taxpayer's liability." *Ibid.* The Tax Injunction Act prohibits the court from exercising jurisdiction because "any determination that A.R.S. § 43-1089 is unconstitutional would restrain the State's

ability to assess taxes in accordance with its state tax system." *Ibid.*

The district court noted that respondents had not claimed that they lacked "a plain, speedy and efficient remedy" to challenge the Arizona tax credit in the Arizona state courts. Indeed, "an identical challenge to the constitutionality [of] § 43-1089" was made, and rejected, in the state courts in *Kotterman* v. *Killian*, 972 P.2d 606, cert. denied, 528 U.S. 921 (1999). Pet. App. 30 n.1. Because the State has provided adequate procedures for respondents' claims to be raised in state courts, the district court concluded that the Tax Injunction Act deprives the federal courts of jurisdiction over respondents' claims in this case. Pet. App. 34.[2]

3. The court of appeals reversed. Pet. App. 11-26. The court concluded that the district court had interpreted the term "assessment" in the Tax Injunction Act too broadly. Pet. App. 21. The court stated (Pet. App. 16) that

> [t]he term "assessment" has two definitions relevant to the question presented in this case: (1) "to estimate officially the value of (property, income, etc.) as a basis for taxation," and (2) "to impose a tax or other charge on." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 90 (1979).

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[2] In addition, the district court held that, even if "tax credits are not covered by the specific language of the TIA, the underlying principles of comity and equitable restraint that are embodied in the Act prevent this Court from exercising jurisdiction over the action." Pet. App. 34. The district court did not address petitioner's contention that the Eleventh Amendment precludes this suit in federal court, and that contention was not raised in the petition in this case.

The court concluded that neither of these dictionary "definition[s] of the term describes the role of the * * * tax credit in the Arizona tax system." Pet. App. 16. The court stated that the tax credit was "applied to the calculation of taxes *after* a taxpayer's gross income has been determined and therefore plays no part in the 'assessment' of property or income as a basis for the imposition of taxes." *Ibid.* The court further stated that the challenged state tax credit "is not the imposition of a tax" but is instead "the grant of a benefit." *Id.* at 17. Moreover, the court reasoned that the purposes of the Tax Injunction Act would not be furthered by applying it in these circumstances because, if the state tax credit "were to be struck down on Establishment Clause grounds, Arizona's ability to raise revenue would not be diminished; on the contrary, it would be enhanced." *Id.* at 20.

For these reasons, the court concluded that the Tax Injunction Act does not bar federal courts from enjoining application of a state tax credit in the determination of state tax liabilities.[3] Pet. App. 20. The court remanded the case for the district court to address the merits of respondents' constitutional claims. *Id.* at 26.

4. When the decision of the court of appeals was announced, one judge of the Ninth Circuit requested a vote on whether the case should be heard en banc. Following that vote, the court denied the request for rehearing en banc.

Judge Kleinfeld, joined by one other judge, dissented from the denial of en banc review. Pet. App. 1-10.

[3] For this same reason, the court of appeals also rejected petitioner's claim that general principles of comity preclude the federal courts from addressing the validity of the state tax in this case. Pet. App. 25-26.

Judge Kleinfeld stated that "[t]he panel's narrowing construction of the Tax Injunction Act ought to have been rejected." *Id.* at 3. He explained that the term "assessment" in the Tax Injunction Act has a much broader meaning than that contained in the single dictionary source cited by the panel. Judge Kleinfeld noted that other dictionaries define the term "assessment" more broadly as "the entire plan or scheme fixed upon for charging or taxing." *Id.* at 4 (quoting, *e.g.*, *Webster's Third New International Dictionary* 131 (1981)). He further emphasized that the term "assessment" has a well-established broader meaning in federal tax statutes and, in particular, in the provisions of the Internal Revenue Code. Under that well-established meaning, the statutory term "assessment" (Pet. App. 4-5 (emphasis added)):

> refers to the bottom line, how much money the taxpayer owes to the government in taxes, *after consideration of any credits as well as deductions.*

Judge Kleinfeld emphasized that "[t]here is no reason to think that Congress meant something narrower in the Tax Injunction Act than it did in the Internal Revenue Code." *Id.* at 5. Under this accepted meaning of the statutory term, Judge Kleinfeld concluded that the plain text of the Tax Injunction Act deprives the federal courts of jurisdiction to enjoin the State from applying state tax credits in making "assessments" of state income taxes. *Ibid.*

SUMMARY OF ARGUMENT

1. The court of appeals erred in its narrow interpretation of the Tax Injunction Act. That Act generally prohibits federal courts from enjoining or restraining "the *assessment*, levy or collection *of* any *tax under State law*." 28 U.S.C. 1341 (emphasis added). The court below manifestly erred in concluding that the term "assessment" in this statute refers merely to the process by which the tax collector determines the amount of *gross income* to which the tax applies. The "assessment * * * of * * * tax under State law" to which this Act refers is the entire process by which the ultimate amount of the *tax* liability is determined by the state taxing authority.

In making a tax "assessment * * * under State law," the taxing authority must do more than merely calculate the gross income to which the tax applies. It must also give effect to state-law provisions that establish deductions and tax credits. As the dissenting judges in the court below concisely and correctly explained, the statutory term "assessment * * * of * * * tax" (28 U.S.C. 1341) "refers to the bottom line, how much money the taxpayer owes to the government in taxes, *after consideration of any credits* as well as deductions." Pet. App. 4-5 (emphasis added). An injunction that prohibits the State from applying state tax credit or tax deduction provisions to individual taxpayers thus directly restrains the State from making an "assessment * * * of * * * tax under State law" (28 U.S.C. 1341). Because respondents seek precisely such an injunction, their action is barred by the plain text of the Tax Injunction Act.

2. This conclusion is compelled by the broad purposes of the Tax Injunction Act as well as by its plain

text. The Tax Injunction Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976). This Court has emphasized that the Act is to be interpreted broadly and that federal courts are to "guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Arkansas* v. *Farm Credit Services*, 520 U.S. 821, 827 (1997).

The essential purpose of this Act is "to prohibit courts from restraining any aspect of the tax laws' administration." *South Carolina* v. *Regan*, 465 U.S. 367, 399 (1984) (O'Connor, J., concurring). In particular, the Act expressly precludes "injunctions [based] upon the alleged legality or character of a particular assessment." *Ibid.* Since respondents seek an injunction precisely because of the alleged illegality of the State's assessment of taxes, and since it is not disputed that the state courts provide an adequate forum for challenging the state tax, this suit may not proceed in federal court under the Tax Injunction Act.

ARGUMENT

THE TAX INJUNCTION ACT, 28 U.S.C. 1341, BARS THIS SUIT IN FEDERAL DISTRICT COURT TO ENJOIN APPLICATION OF A STATE TAX CREDIT IN THE ASSESSMENT OF STATE INCOME TAXES

I. THE PLAIN TEXT OF THE TAX INJUNCTION ACT BARS THE INJUNCTION SOUGHT BY RESPONDENTS IN THIS CASE

The court of appeals erred in concluding that the Tax Injunction Act does not apply to this case. The plain text of the Act precludes the federal district courts

from restraining or enjoining a State from applying state tax credits in the assessment of state taxes.

1. The Tax Injunction Act generally provides that federal courts may not enjoin, suspend or restrain "the assessment, levy or collection of any tax under State law." 28 U.S.C. 1341. The court below erred in concluding (Pet. App. 16) that the term "assessment" in this statute refers merely to the process by which the tax collector determines the amount of *income* to which the tax applies. The "assessment * * * of * * * tax" to which the Act refers is the entire process by which the ultimate amount of the tax liability is determined by the state taxing authority.

In making a tax "assessment * * * under State law" (28 U.S.C. 1341), the taxing authority must do more than merely calculate the gross income to which the tax applies. It must also give effect to the state-law provisions that establish deductions and tax credits "under State law." As the dissenting judges concisely and correctly explained below, the statutory term "assessment * * * of tax under State law" "refers to the bottom line, how much money the taxpayer owes to the government in taxes, *after consideration of any credits* as well as deductions." Pet. App. 4-5 (emphasis added).[4]

2. The parallel provisions of federal tax law, on which the Tax Injunction Act was modeled, similarly specify that courts are not to restrain or enjoin the "assessment or collection of any [federal] tax." 26 U.S.C. 7421(a); see *Jefferson County* v. *Acker*, 527 U.S.

[4] The district court similarly explained that, "when the state offers tax credits to reduce tax liability, the credits become an integral part of the State's assessment of each taxpayer's liability." Pet. App. 31.

at 434.[5] In incorporating this same terminology into the Tax Injunction Act, Congress presumably meant the term "assessment" to have the same meaning in both provisions. And, the meaning of the term "assessment" in federal tax law unquestionably encompasses not merely the determination of the amount of gross income to which the tax applies but also the application of all federal tax deduction and tax credit provisions.

The "assessment * * * of tax" described in the text of 26 U.S.C. 7421(a) is plainly *not* the limited, dictionary definition of an "assessment" selected by the court of appeals.[6] Under the Internal Revenue Code, an assessment of a tax is the formal administrative record of "the *liability* of the taxpayer." 26 U.S.C. 6203 (emphasis added). The "assessment" is made through a "summary record of assessment," which, with supporting records,

[5] The Tax Injunction Act was enacted in 1937. The federal tax analogue on which it was modeled was first enacted as Section 10 of Chapter 169 of the Act of Mar. 2, 1867, 14 Stat. 475, and is now codified at 26 U.S.C. 7421(a). In language that Congress also employed in the text of the Tax Injunction Act, this venerable statute has specified since 1867 that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." § 10, 14 Stat. 475.

[6] To the extent that the dictionary definition of "assessment" is relevant in determining the meaning of that statutory term of art, contemporaneous dictionaries reflect a considerably broader understanding of the term than the meaning selected by the court of appeals. See, *e.g.*, *Funk & Wagnall's New Standard Dictionary of the English Language* 171 (1946) ("[t]he official apportionment of taxes" or "[t]he amount so fixed"); *Webster's New International Dictionary* 139 (1917) ("act of apportioning or determining an amount or amounts to be paid; as, an *assessment* of damages, or of taxes"; "[t]he entire plan or scheme fixed upon for charging or taxes; also, the valuation, or a specific charge or tax, determined upon").

identifies the taxpayer, the period of tax involved, "and the amount of the assessment." 26 C.F.R. 301.6203-1. The "assessment" is thus "essentially a bookkeeping notation" that serves as a formal record of the total amount of the tax liability determined by the taxing authority. *Laing* v. *United States*, 423 U.S. 161, 170 n.13 (1976). In short, by the time that the Tax Injunction Act was enacted in 1937, it was well established that the "assessment" of a federal tax is the administrative process by which the taxing authority determines and records "the total tax" owed. *Anderson* v. *United States*, 15 F. Supp. 216, 225 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937).

This fundamental characteristic of an "assessment * * * of * * * tax" (28 U.S.C. 1341) is reflected in numerous provisions of the Internal Revenue Code. For example, the federal tax lien arises in property of the taxpayer "at the time the assessment is made and * * * continue[s] until the *liability for the amount so assessed* * * * is satisfied * * * *." 26 U.S.C. 6322 (emphasis added). As this statute reflects, the "assessment" is the formal record of the "amount" of the tax "liability" of the taxpayer. See M. Saltzman, *IRS Practice & Procedure* ¶ 10.02 , at 10-4 to 10-7 (2d ed. 1991) (the "assessment" is the record of "the total tax liability" and sets out the "specific amount of tax" owed). Similarly, the Internal Revenue Code further specifies that "*the amount of any tax* imposed by this title *shall be assessed* within 3 years after the return was filed." 26 U.S.C. 6501(a) (emphasis added). It is thus the amount of the *tax*, not merely the amount of the taxpayer's "income," that is assessed.

3. Contrary to the reasoning of the court below, the term "assessment" as used in these statutes thus does *not* refer simply to the process by which gross income is

determined. Instead, the allowance of a tax credit is as much a part of the "assessment" as is the determination of the income and the deductions of the taxpayer. As the Fifth Circuit recently concluded in *ACLU Foundation* v. *Bridges*, 334 F.3d 416, 421 (5th Cir. 2003), the term "assessment" in the Tax Injunction Act necessarily encompasses "'the entire plan or scheme fixed upon for charging or taxing.' Webster's Third New International Dictionary 131 (1981)."

The reasoning of the court of appeals failed to address the entire relevant text of the statute. In looking for a dictionary definition of the word "assessment" in isolation from the balance of the statutory text, the court neglected to consider that this word draws meaning from its context.[7] The statutory phrase of relevance to this case is that federal courts are barred from enjoining the "assessment * * * *of* * * * *tax under State law*." 28 U.S.C. 1341 (emphasis added). It is the assessment *of tax* that may not be restrained; and, in particular, the State may not be restrained from applying "State law" in making such an assessment. Since the precise relief sought by respondents in this case is an order restraining the State from applying its state tax credit law in making assessments of state tax, respondents' action is barred by the plain text of the Tax Injunction Act.

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[7] "[T]he meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregrate take their purport from the setting in which they are used . . . ." *Ibid.* (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)).

4. The court of appeals also erred in suggesting that the Tax Injunction Act should not apply whenever the requested relief would increase, rather than diminish, the ultimate amount of taxes collected. Pet. App. 21-22. As the Sixth Circuit explained in *In re Gillis*, 836 F.2d 1001, 1005 (1988), "[w]hile admittedly the great majority of cases present plaintiffs seeking to enjoin the collection of taxes, and certainly the most direct threat to the state fisc is presented when the collection of taxes is enjoined, still the Act is not, by its own language, limited to the *collection* of taxes." Instead, the Act broadly prohibits federal courts from restraining any "assessment * * * of * * * tax under State law." 28 U.S.C. 1341.

A federal suit to enjoin a state tax credit is, in any event, as significant an intervention in a State's tax administration as is a suit to enjoin an *increase* in the State's taxes. In rejecting the suggestion that a suit that could result in an increase in state tax collections should be treated as outside the scope of the Tax Injunction Act, the Eleventh Circuit pointed out in *Colonial Pipeline Co.* v. *Collins*, 921 F.2d 1237, 1242 (1991), that:

> In making these overly literal and technical attempts to distinguish its claim from the scope of section 1341, Colonial ignores the basic fact that its requested relief, if granted, would require a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system. Such an intrusion would clearly conflict with the principle underlying the Tax Injunction Act that the federal courts should generally avoid interfering with the sensitive and peculiarly local concerns surrounding state taxation schemes.

See also *In re Gillis*, 836 F.2d at 1008 ("the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax; and the expense to the state in defending the action is identical"); *United States Brewers Ass'n* v. *Perez*, 592 F.2d 1212, 1214 (1st Cir. 1979) (even litigation that might increase the amount of taxes collected would impermissibly "disrupt the orderly collection and administration of state taxes").[8]

It is, in any event, far from certain that a victory by persons who challenge a tax credit will necessarily result in the collection of more taxes by the State. As the court emphasized in *ACLU Foundation* v. *Bridges*, 334 F.3d at 421, a State "may resolve any putative constitutional problems created by the challenged statutes by exempting more entities and therefore collecting less taxes." The ultimate effect of invalidating a tax credit thus cannot be foretold with certainty. See *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803, 818 (1989) (the invalidity of a state tax exemption may be remedied by the State "either by extending the tax exemption" to a broader class of recipients "or by eliminating the exemption"). Such speculation, in any event, has no bearing on the proper application of the express prohibition of the Tax Injunction Act against restraints on the "assessment * * * of * * * tax under state law." 28 U.S.C. 1341.

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[8] The court of appeals thus erred in concluding that the Act is inapplicable because "the challenged practice is not the imposition of a tax." Pet. App. 17. The relevant question under the Act is whether the plaintiff seeks to interfere with the "assessment * * * of a tax under State law." The fact that a state tax credit is not itself the "imposition of a tax" is beside the point, because a State tax credit is an integral part of the process of assessing a tax.

II. THE TAX INJUNCTION ACT IS TO BE INTERPRETED BROADLY IN LIGHT OF THE CLEAR INTENTION OF CONGRESS TO LIMIT THE INTERFERENCE OF FEDERAL DISTRICT COURTS IN THE STATE'S ADMINISTRATION OF ITS FISCAL POLICIES

1. The Tax Injunction Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976). See *Arkansas* v. *Farm Credit Services*, 520 U.S. 821, 832 (1997). Both "Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration." *National Private Truck Council, Inc.* v. *Oklahoma Tax Commission*, 515 U.S. 582, 586 (1995). This Court has emphasized that "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation," and "[t]he federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary." *Arkansas* v. *Farm Credit Services*, 520 U.S. at 826. The Court has therefore instructed "federal courts [to] guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Id.* at 827.

The Court has thus made clear that the provisions of this Act are to be broadly interpreted to achieve the legislative goal of minimizing federal interference in state tax matters. *Arkansas* v. *Farm Credit Services*, 520 U.S. at 827.[9] Although the history of the Act

[9] Indeed, in various contexts, the Court has concluded that the prohibitions of the Tax Injunction Act reach beyond its literal

addressed a particular congressional concern that out-of-state corporations were improperly using federal litigation to delay the payment of state taxes, the Court has emphasized that "the expansive language of the statute belies the notion that Congress was concerned exclusively with this problem." *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 522 n.29 (1981). Instead, the enactment of "the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *California* v. *Grace Brethren Church*, 457 U.S. at 409 n.22.

2. Consistent with this Court's admonition, the courts of appeals have routinely given a broad interpretation to the provisions of this Act. They have, for example, held that "the Act prohibits relief where it would result in a restraint on tax assessment even though achieved indirectly" (*Jerron West, Inc.* v. *California State Bd. of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1998)), and have further concluded that the Act bars federal jurisdiction in actions for refund or damages "lest the Tax Injunction Act be deprived of its full effect." *Marvin F. Poer & Co.* v. *Counties of Alameda*, 725 F.2d 1234, 1236 (9th Cir. 1984). The courts have also ruled that the Act "deprives the district court of jurisdiction over the claims of unlawful

scope. For example, in *National Private Truck Council, Inc.* v. *Oklahoma Tax Commission*, 515 U.S. at 588, the Court held that federal courts should not "award damages or declaratory or injunctive relief in state tax cases when an adequate state remedy exists." See also *California* v. *Grace Brethren Church*, 457 U.S. 393, 408-409 (1982) (applying the Tax Injunction Act to prohibit a district court from issuing a declaratory judgment holding state tax laws unconstitutional).

arrest and assault" in an action against State officials involving state taxes, because such a suit "would intrude on the enforcement of the state [tax] scheme." *Comenout* v. *Washington*, 722 F.2d 574, 578 (9th Cir. 1983). See also *Dillon* v. *Montana*, 634 F.2d 463, 465 (9th Cir. 1980) ("this court has recognized that any effort to obtain tax exemption or adjustment in federal court interferes with the fiscal operations of the state"); *United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323, 326 (5th Cir. 1979) (stating that the Tax Injunction Act "is meant to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems").

That broad view of the scope of the Act is paralleled by the broad interpretation given to 26 U.S.C. 7421(a), on which the Tax Injunction Act was modeled. See note 5, *supra*. The history of 26 U.S.C. 7421(a) "reflects the congressional desire that all injunctive suits against the tax collector be prohibited." *South Carolina* v. *Regan*, 465 U.S. 367, 387 (1984) (O'Connor, J., concurring). "The Court has interpreted the principal purpose [of 26 U.S.C. 7421(a)] to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference." *Bob Jones University* v. *Simon*, 416 U.S. 725, 736 (1974). And, under 26 U.S.C. 7421(a), as under the Tax Injunction Act, the "ban against judicial interference * * * is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes." *Smith* v. *Rich*, 667 F.2d 1228, 1230 (5th Cir. 1982).

These parallel statutory prohibitions against judicial restraints on the assessment of taxes do not become inapplicable merely because the "legality of the agency's action is in question." *Yamaha Motor Corp., U.S.A.* v. *United States*, 779 F. Supp. 610, 613 (D.D.C. 1991).[10] As Justice O'Connor emphasized in a concurring opinion in *South Carolina* v. *Regan*, 465 U.S. at 399, the broad purpose of the tax anti-injunction provisions is "to prohibit courts from restraining any aspect of the tax laws' administration." To further that goal, these statutes expressly preclude "injunctions [based] upon the alleged legality or character of a particular assessment." *Ibid.* In the present case, respondents seek an injunction against the "assessment * * * of * * * tax under state law" (28 U.S.C. 1341) that is based precisely upon the claim that such assessments would be unlawful. That claim for relief is barred in federal district court by the clear text and broad purposes of the Tax Injunction Act.

[10] The prohibition in 26 U.S.C. 7421(a) against an action to restrain the assessment of federal taxes has been applied in circumstances similar to those of the present case. In *Haring* v. *Blumenthal*, 471 F. Supp. 1172, 1177-78 (D.D.C. 1979), for example, the court held that 26 U.S.C. 7421(a) "prevents the institution of injunction actions to challenge tax exemption rulings in favor of other taxpayers."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 02-1809

IN THE

Supreme Court of the United States

J. ELLIOT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE HONORABLE TRENT FRANKS, THE ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, AND THE CENTER FOR ARIZONA POLICY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* IN THIS CASE[1]

The Honorable Trent Franks – Representative Franks authored the bill that became ARIZ. REV. STAT. § 43-1089, after his tenure as an Arizona legislator. Section 43-1089, which is at issue in this case, allows taxpayers to reduce their state tax liability by claiming a credit for amounts they have donated to a school tuition organization. An avid supporter of educational choice, Congressman Franks is currently introducing similar legislation at the federal level.

The Arizona Christian School Tuition Organization (ACSTO) – ACSTO is the second largest recipient of the funds that Arizona taxpayers privately and independently choose to donate under ARIZ. REV. STAT. § 43-1089. School tuition organizations are non-profit corporations that collect funds, evaluate applications, and award scholarships to deserving students who wish to attend private schools. As one of these organizations, ACSTO's interest in this case is self-evident.

The Center for Arizona Policy (CAP) – CAP was established in 1995 as a non-profit organization dedicated to strengthening Arizona families through policy and education. CAP accomplishes this by actively educating Arizonans on educational choice, religious freedom, parenting, and other issues. CAP strongly supports educational choice and worked with Congressman Franks in the enactment process of ARIZ. REV. STAT. § 43-1089. CAP also filed an *amicus* brief in defense of the statute in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici believe that this case presents the classic opportunity for the federal courts to exercise comity and recognize the inherent dignity and value of the state branch of our dual legal system. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *U.S. v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). In seeking the "best solution" to advance its important interest in improving education, Arizona has successfully experimented with its scheme of assessment, levy, and collection of taxes by including a tax credit – one of many – whereby Arizona taxpayers may reduce their State tax liability by claiming a tax credit for capped amounts they have paid to a "school tuition organization."

SUMMARY OF THE ARGUMENT

Arizona has decided to advance certain fiscal and policy goals through an enacted tuition tax credit, which is part of its larger taxation scheme. The statute at issue has already withstood constitutional challenge in prior state court litigation, but Respondents seek to challenge the statute in federal court. This Court should bar this action.

Federal court interference in state taxation schemes has long been disfavored. Even without the Tax Injunction Act, principles of comity bar subject matter jurisdiction in this case. The panel ignored the scope of comity and the Act to conclude that federal court jurisdiction was proper. To reach this conclusion, the court exchanged well-established principles of comity and the text of the Act for a novel

"money in, money out" bright-line test. This new test is based on one question: "Will the state receive more money if the suit is allowed?" Employing this test, the panel examined the merits of the case, assumed a positive answer, and declared the Act and comity were inapplicable. This approach conflicts with this Court's precedent: jurisdiction is a threshold question to be answered before reaching the merits.

Principles of comity require federal courts to refrain from interfering in state matters where an adequate remedy exists at state law. "Our Federalism" mandates this approach because of the concurrent jurisdiction shared by the federal and state systems. Comity applies specifically in the context of state taxation. Respondents have not shown the lack of an adequate state remedy – but simply an adverse state court decision. There is no constitutional imperative for federal courts to second guess state court decisions.

Furthermore, Congress has explicitly barred federal court interference in this case by enacting the Tax Injunction Act. This Court has interpreted the Act to foreclose federal court injunctive and declaratory relief in the "assessment, collection, and levy" of state taxes whenever there is a "plain, speedy, and efficient" remedy to be had in state court. Arizona's tax credit is part of the state's broad taxation scheme and qualifies as an "assessment" under the Act's plain language. In this case, the Ninth Circuit ignored the Act's text, the Act's purpose and legislative history, this Court's precedent, other appellate precedent, and even its own precedent to reach its desired conclusion. The panel's erroneous decision narrows the Act, the definition of "assessment," and principles of comity beyond recognition.

The Act, broad principles of comity, and the consistent precedent of this Court and appellate courts all dictate one

conclusion: federal subject matter jurisdiction is barred in this case. There is no reason for federal court interference in the delicate scheme of taxation that Arizona has chosen to advance its fiscal and policy goals. This Court should reverse the panel decision below.

ARGUMENT

This case addresses the delicate balance between the federal and state governments in the context of Arizona's tax laws. Here, principles of comity and the Tax Injunction Act are bars to federal court jurisdiction. These bars are premised on our system of dual sovereigns: the national and state governments:

> That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied.

McCulloch v. Md., 4 Wheat. 316, 425 (1819).

I.

THE NINTH CIRCUIT HAS CREATED A NOVEL, NARROW, BRIGHT-LINE TEST: THE "MONEY IN, MONEY OUT" THEORY OF JURISDICTION UNDER THE TAX INJUNCTION ACT.

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Tax Injunction Act, 28 U.S.C. § 1341.

Though this Court and other circuits have interpreted the Act, and its underlying principles of comity, as a broad jurisdictional bar, the Ninth Circuit has not followed suit. Instead, the panel below created a bright-line "money in, money out" test, which essentially asks one question: "Will more money come into state coffers if the plaintiffs prevail in the lawsuit?" If the answer is "yes," then, according to the Ninth Circuit, federal jurisdiction is proper. On the other hand, if money "goes out" from the treasury, jurisdiction is declined. This test ignores broad, longstanding principles of comity and the Tax Injunction Act's explicit removal of federal court jurisdiction. *See* Parts II and III, *infra.* Furthermore, the court's reasoning is circular.

The circle began with the court examining the facially neutral Arizona taxation law for its effect on the state coffers. *Winn v. Killian*, 307 F.3d 1011, 1013 (9th Cir. 2002). In the next arc, the court noted that funds flowing through school tuition organizations to individual students may ultimately benefit religious organizations. *Id.* at 1014. In the third arc, the court posited that, if "the STO tax scheme were to be struck down on Establishment Clause grounds, Arizona's ability to raise revenue . . . would be enhanced." *Id.* at 1017. In the final arc, the court concludes that, because striking down the law would increase state revenue, this suit does not interfere with tax collection and, thus, is not barred by the Tax Injunction Act. *Id.* at 1018 ("the relief requested . . . would result in the state's receiving more funds that could be used for the public benefit"). The fallacious circle is complete: jurisdiction is obtained by examining the merits and assuming a result which would confer jurisdiction – a loose approach to jurisdiction for which this Court has previously chastised the Ninth Circuit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); *and see id.* at 101-102 ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has

no jurisdiction to do so is, by very definition, for a court to act ultra vires.").[2]

Respondents are clearly disappointed with the Arizona Supreme Court decision that upheld the constitutionality of the tax credit challenged here. *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999), *cert. denied,* 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999) ("We hold that the tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures. Petitioners have failed to demonstrate that it violates either the Federal or the Arizona Constitution."). Despite state court litigation in a virtually identical case, Respondents seek another bite at the jurisprudential apple in federal court. That bite is forbidden by principles of comity and the Tax Injunction Act. *Amici* urge this Court to reject the Ninth Circuit's bright-line test, its myopic reading of the Tax Injunction Act, and its disregard of the important underlying principles of comity.

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[2] The Ninth Circuit's novel approach to the Tax Injunction Act coincidentally arose from an Establishment Clause challenge by plaintiffs seeking to enjoin the director of revenue from "diverting" funds to religious organizations. Under these facts, it is very unlikely that plaintiffs have standing to sue, even if the court had jurisdiction. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (Article III requires actual or threatened injury, fairly traceable to the challenged action, which is likely to be redressed by a favorable decision); *and see Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) ("[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."). It is difficult to see how Arizona's director of revenue is "diverting funds" to religious schools in alleged violation of the Establishment Clause when the choice is left to individual taxpayers, and the director has absolutely no say in the decision. Indeed, the Arizona Supreme Court has already properly decided the matter. *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999), *cert. denied,* 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 810 (1999).

II.

PRINCIPLES OF COMITY BAR FEDERAL COURT INTERFERENCE IN A STATE TAXATION SCHEME

A. Throughout Its History, This Court Has Recognized Principles of Comity between Federal and State Courts.

Principles of comity (originally known as "the comity of nations") guide the relationship between dual sovereigns. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). The comity of nations is the "extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation." *Id.* Principles of comity also guide relationships between: 1) the United States and foreign nations, *Hilton*, 159 U.S. at 163, 2) a state with another state, *Forgan v. Bainbridge*, 274 P. 155, 158 (Ariz. 1928), and 3) the United States and a state, *Covell v. Heyman*, 111 U.S. 176, 182 (1884). In cases involving international law, comity is neither an "absolute obligation," nor "mere courtesy and goodwill"; it is the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation." *Hilton*, 159 U.S. 113, 163-64 (1895). "It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests." *Id.* at 165.

In comparison, "states of the Union are considered as foreign nations, and separate sovereignties," except as otherwise qualified by the Federal Constitution. *Forgan*, 274 P. at 158 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)). Thus, principles of comity have much greater import within

our federalist system of government, than in the international context: "[Comity] between state courts and those of the United States . . . is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience." *Covell*, 111 U.S. at 182.

Courts continued to observe rules of comity as "principle[s] of right and of law" into the twentieth century. *See Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) ("The scrupulous regard for the rightful independence of state governments . . . and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it."); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909) ("[A] proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused [this Court] to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 237 (1908) ("[A]s applied to Federal interference with state acts, the observance of this rule of comity should be regarded as an obligation.").

Justice Black gave perhaps the most stirring modern restatement of comity in:

> [T]he notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the

> profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."

Younger v. Harris, 401 U.S. 37, 44 (1971).

Thus, "Our Federalism" requires the consistent and continued application of comity to prevent erosion of the delicate balance between the state governments' general powers and the federal government's enumerated powers. In this case, comity weighs heavily in favor of declining federal jurisdiction.

B. This Court Applies Principles of Comity in the Context of State Tax Systems.

This Court has acknowledged that "[t]he power to tax is basic to the power of the State to exist." *Ark. v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 826 (1997). Because of this high level of importance, "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation." *Id.*

Unlike the Ninth Circuit's decision below, *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), this Court has never limited the application of comity to suits seeking to restrain the collection of a tax. Rather, this Court has a "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations." *Matthews*, 284 U.S. at 525. This restraint on interference with state "fiscal operations" is but one part of the comity afforded the "internal economy and administration" and the general "domestic policy of the states." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943) (noting that Congress had approved the

practice of comity through enactment of the Tax Injunction Act); *see also State Tax Comm'n v. Anderson Dev. Corp.*, 574 P.2d 43, 46-47 (Ariz. Ct. App. 1997) (legislation effects domestic policy via tax incentives), *review denied*.

C. Appellate Courts Have Correctly Applied Principles of Comity in the Context of State Tax Systems.

Lower appellate courts have joined this Court in recognizing that principles of comity prohibit federal court interference in state tax matters.

The Sixth Circuit stated that "the scope of federal court deference based on principles of comity is substantially broader than that required under the Tax Injunction Act." *In re Gillis*, 836 F.2d 1001, 1006 (6th Cir. 1988). The *Gillis* court concluded, "[E]ven if the facts of a state tax matter do not technically fit within the language of § 1341, the federal courts should restrain from interfering in the state proceedings." *Id.* at 1005.

The First Circuit used principles of comity to bar an attempted federal court challenge to a Puerto Rican tax. *U.S. Brewers Ass'n, Inc. v. Perez*, 592 F.2d 1212, 1214 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979); *and see id.* at 1215 ("Sound equity practice and a concern for interests of federalism" barred relief). The *Perez* court based its decision on the considerations of equity practice, principles of federalism, and "the imperative need of a State to administer is own fiscal operations." *Id.* (quoting *Tully v. Griffin*, 429 U.S. 68, 73 (1976)). In addition, the *Perez* court noted:

> [A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations.

Id. The case at bar also presents a request for a federal order requiring Arizona to collect taxes "which its legislature has not seen fit to impose." *Id.* This is precisely the scenario where comity should bar federal jurisdiction.

The novel "money in, money out" test is all the more noxious in light of the Ninth Circuit's earlier – proper – application of comity to deny jurisdiction in a case brought, like the instant case, under 42 U.S.C. § 1983. *Patel v. City of San Bernardino*, 310 F.3d 1138, 1142 (9th Cir. 2002).[3] There, the court broadly interpreted the Tax Injunction Act by stating: "we will not carve out a new exception [to the Act] here, particularly one that would offend principles of comity by encouraging bifurcated litigation between state and federal courts." *Id.* This bifurcated litigation is precisely what Petitioner properly seeks to avoid in this case.

The case now before the court radically narrows comity: "comity . . . prevent[s] interference with the states' collection

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[3] *Patel* is but one of many prior examples where the Ninth Circuit broadly applied comity to bar federal jurisdiction. *See, e.g., Jerron West, Inc. v. State of Cal., State Bd. of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1997) ("the principle of comity alone would bar federal courts from granting damages relief in state tax cases"); *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 771 (9th Cir. 1986) ("the principle of comity generally bars challenges to the validity of state tax systems in federal court"); *Poer and Co. v. Counties of Alameda*, 725 F.2d 1234, 1236 (9th Cir. 1984) (Tax Injunction Act and principle of comity barred action); *Miller v. City of Los Angeles*, 755 F.2d 1390 (9th Cir. 1985) ("Taxpayers are barred by the principle of comity from asserting section 1983 actions against the validity of state tax systems in federal court."), *cert. denied*, 474 U.S. 995 (1985); *Hawaiian Tel. Co. v. State Dept. of Labor and Indus. Relations*, 691 F.2d 905, 910 (9th Cir. 1982) ("We also note that McNary suggests that the principle of comity alone would bar this action.").

of revenue." *Winn*, 307 F.3d at 1019. This deflated version of comity is not the robust, respectful principle applied by this Court, other appellate courts, and even the Ninth Circuit itself in prior decisions. Justice Black reminds us of comity's broad scope:

> What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger, 401 U.S. at 44-45.

Additional support for following principles of comity in this case is gained by realizing that there is an adequate remedy in state court.

D. This Court Should Apply Principles of Comity in This Case Because There is an Adequate Remedy in State Court.

As a practical matter, the existence of a "plain, speedy and efficient remedy" in state court is what makes comity a just and useful way to regulate access to federal courts. As this Court has noted, "Prior to enactment of § 1341, virtually all federal cases challenging state taxation sought equitable relief." *Fair Assessment in Real Estate, Ass'n, Inc. v. McNary*, 454 U.S. 100, 107 (1981). Therefore, courts were guided by the principle that equitable relief is not available

"in any case where a plain, adequate, and complete remedy may be had at law." *Singer Sewing Mach. Co. of N.J. v. Benedict*, 229 U.S. 481, 484 (1913).[4] This Court has explained:

> Such restraint was particularly appropriate because of the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court.

Fair Assessment, 454 U.S. at 108.

Courts have uniformly held that "the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States." *Singer Sewing*, 229 U.S. at 485. This long-standing rule indicates the confidence of federal courts that state courts are able to preserve, unimpaired, the federal rights of United States citizens. *Boise Artesian*, 213 U.S. at 281-82.

In this case, the adequate remedy at state law allows comity to bar federal court jurisdiction. As Circuit Judge Kleinfeld noted below:

> The district court did just what the law requires. . . . Arizona provides a means to challenge its tax code and allows parties to raise federal constitutional challenges to its provisions. Indeed, this very tax credit was challenged on constitutional grounds throughout the Arizona courts. The Arizona Supreme Court provided a thoughtful and

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[4] There is no significant difference between remedies that are "plain, speedy and efficient," as used in the Act, and remedies that are "plain, adequate, and complete," as used in explaining the doctrine of equitable restraint. *Fair Assessment*, 454 U.S. at 116 n.8.

scholarly opinion on the merits of the constitutionality of the tax credit at issue in this case.

Winn v. Killian, 321 F.3d 911, 914 (9th Cir. 2003) (Kleinfield, J., dissenting from denial of rehearing *en banc*).

The principles of comity that characterize our dual system have long been recognized by this Court and lower federal courts. Therefore, this Court should reverse the Ninth Circuit and hold that principles of comity deprive the federal district court of subject matter jurisdiction in this case.

III.

THE TAX INJUNCTION ACT DEPRIVES THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION IN THIS CASE

By enacting the Tax Injunction Act, Congress saw fit to apply the broad principles of comity specifically to protect the states' ability to manage their respective tax systems.

A. The Plain Language of the Tax Injunction Act Bars Federal Court Jurisdiction in this Case.

1. The term "assessment" encompasses Arizona's tax credit.

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Tax Injunction Act, 28 U.S.C. § 1341. The plain language of the statute bars federal jurisdiction in this case.

Under standard rules of interpretation, this Court must "'give effect, if possible, to every clause and word of [the] statute.'" *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Township v. Ramsdell*, 107 U.S. 147, 152 (1883)); *see also Mudge v. U.S.*, 308 F.3d 1220, 1228 (Fed. Cir. 2002). The Act specifically uses "assessment," "collection," and "levy."[5] Each of these words has a separate meaning that must be given its full import. *Menasche*, 348 U.S. at 538-39.

In spite of this Court's warning that "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text," *Farm Credit Servs.*, 520 U.S. at 827, the panel below narrowly defined the term "assessment" within the Act as: "to estimate officially the value of (property, income, etc.) as a basis for taxation," and "to impose a tax or other charge on." *Winn*, 307 F.3d at 1015. Such reliance on a dictionary is scarcely dispositive when other, equally weighty definitions give a meaning that is congruent with case law. *See, e.g., Webster's Third New International Dictionary* 131 (1981) ("assessment" means "the entire plan or scheme fixed upon for charging or taxing"); *Black's Law Dictionary* 116-17 (6th ed. 1990) ("assessment" means "determining the share of a tax to be paid by each of many persons"); *The Oxford English Dictionary* 506 (1961) ("assessment" means "[t]he scheme of charge or taxation so adjusted").

This "dictionary war" is wholly unnecessary because defining "assessment" as "scheme of taxation" is consistent with the Act's plain language as interpreted by the Ninth Circuit's cases before *Winn v. Killian*. For example, *Poer and Co. v. Counties of Alameda* held, "By its plain language,

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[5] Under the actual text of the Act, as applied to this case, only the interpretation of "assessment" is at issue, not that of "collection" or "levy."

the Act deprives federal district courts of subject matter jurisdiction over actions for injunctive relief from state taxation schemes." 725 F.2d 1234, 1235 (9th Cir. 1984) (emphasis added); *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 771 (9th Cir. 1986) (same). Indeed, the Ninth Circuit has interpreted the "expansive language of the Act" as an indication that Congress was not exclusively concerned with foreign corporations using diversity jurisdiction to bleed state coffers, but, rather, to protect the "independent functioning of state tax systems." *Ashton v. Cory*, 780 F.2d 816, 822-23 (9th Cir. 1986).

The narrow definition of "assessment" used below is unsupported by the language of the Act, as interpreted by this Court and by prior Ninth Circuit decisions. Therefore, this Court should hold that Respondents' suit is barred by the Tax Injunction Act because ARIZ. REV. STAT. § 43-1089 is properly understood as "assessment" under Arizona's scheme of taxation. This understanding of the plain text is confirmed by the Act's purpose and legislative history.

2. Arizona has already provided a "plain, speedy and efficient remedy" within the meaning of the Act.

The Tax Injunction Act bars federal court jurisdiction where there is a "plain, speedy and efficient remedy" available in state court. "The Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts, as long as state-court procedures were 'plain, speedy and efficient' and final review of the substantive federal claim could be obtained in this Court." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 515 n.19 (1981), *reh'g denied*, 451 U.S. 1011 (1981).

As this Court has stated: "The overall purpose of the Tax Injunction Act is consistent with the view that the 'plain, speedy and efficient remedy' exception to the Act's prohibition was only designed to require that the state remedy satisfy certain procedural criteria." *Id.* at 522 (construing the Act's "plain, speedy and efficient remedy" exception).

In *Rosewell*, this Court held that a "plain" remedy is one that is not "uncertain" or "unclear." *Id.* at 517. For a remedy to be "speedy," the matter "must not entail significantly greater delay than a corresponding procedure in federal court." *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1055 (9th Cir. 1991) (citing *Rosewell*, 450 U.S. at 519-21), *cert. denied*, 503 U.S. 938 (1992). An "efficient" remedy is one that does not require "ineffectual activity or an unnecessary expenditure of time or energy." *Rosewell*, 450 U.S. at 518.

The Ninth Circuit has agreed with the interpretation of "plain, speedy and efficient remedy" that was given in *Rosewell*: "that the taxpayer be afforded a full hearing and judicial determination in the state courts of any and all federal or constitutional objections to the disputed state tax." *Ashton*, 780 F.2d at 819 (citing *Rosewell*).[6]

Furthermore, according to the Ninth Circuit, an "adequate" state remedy under the Act, "need not necessarily

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[6] The Ninth Circuit has articulated the adequacy of state court remedies on numerous occasions. *See, e.g., Patel*, 310 F.3d at 1140 ("This statute prohibits both declaratory and injunctive relief in state tax disputes as long as the taxpayer has an adequate remedy in state court."); *Jerron West, Inc.*, 129 F.3d at 1337 ("The only exception [to the Act] is where a state does not provide the Taxpayers with an adequate state remedy."); *Amarok Corp. v. State of Nev., Dept. of Taxation*, 935 F.2d 1068, 1069 (9th Cir. 1991) (action in federal court is barred by the Act if the state provides a remedy that is "plain, speedy and efficient").

be 'the best remedy available or even equal to or better than the remedy which might be available in the federal courts.'" *Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974) (citing *Bland v. McHann*, 463 F.2d 21, 29 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973)). While the Ninth Circuit trumpeted its role as "guardians of the people's federal rights" in its decision below, *Winn*, 307 F.3d at 1017, Circuit Judge Kleinfeld reminded us that:

> State judges take the same oath to uphold the federal Constitution that we do, and like us are subject to federal Supreme Court review. . . . The implication of the panel's remark about "the federal courts' role as 'guardians of the people's federal rights'" seems to be that we are the *only* such guardians, or that we are guardians of the Platonic sort. We are not. There is no excuse for relitigating the constitutionality of Arizona's tuition tax credit in federal court.

Winn, 321 F.3d at 912 (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

Here, no one has argued that the state remedy is inadequate, or that it is not a "plain, speedy and efficient remedy." The issues have already been litigated to conclusion in the Arizona Supreme Court, and this Court has declined to review that decision. *Kotterman*, 972 P.2d at 606, *cert. denied,* 528 U.S. at 921, *cert. also denied by Rhodes*, 528 U.S. at 810. Therefore, the Respondents cannot challenge the state court remedy as inadequate – just "unwanted." The issues should not be relitigated in federal court merely because Respondents are unhappy with state court decisions.

In addition to textual support for Petitioner's position, the purpose and legislative history of the Act prevent federal court jurisdiction in this case.

B. The Purpose and Legislative History of the Tax Injunction Act Belie the Ninth Circuit's Narrow Interpretation.

1. The Purpose of the Tax Injunction Act Supports a Broad Interpretation of the Act

"[T]he principal motivating force behind the Act" was the "recognition of the imperative need of a State to administer its own fiscal operations." *Rosewell*, 450 U.S. at 522 (quoting *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976)). In addition, this Court has held that the Act, "and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment*, 454 U.S. at 103.

The historical context of the Act illuminates the Act's purpose. This Court abrogated Eleventh Amendment immunity by allowing federal courts to enjoin state officials in their official capacities. *Ex parte Young*, 209 U.S. 123, 167 (1908). The Act was passed in response to the "congressional hostility to federal injunctions issued against state officials in the aftermath of this Court's decision in *Ex parte Young*," *Rosewell*, 450 U.S. at 522 n.28; *see also Farm Credit Servs.*, 520 U.S. at 826-27. ("Enactment of the Tax Injunction Act of 1937 reflects a congressional concern to confine federal court intervention in state government.").[7] By

[7] Indeed, Justice Harlan's dissent in *Ex parte Young* foreshadowed the arrival of the Tax Injunction Act:

codifying the "decent respect" due the states, Congress restored part of the immunity removed by *Ex parte Young* and "recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Fair Assessment*, 454 U.S. at 102-103.

As this Court has noted, the Act's authors were concerned with the practice of out-of-state corporations bringing diversity suits to delay "payment of state taxes during the pendency of federal litigation while in-state citizens would have to pay first and then litigate in state courts." *Rosewell*, 450 U.S. at 522 n.29. The *Rosewell* Court recognized, however, that "the expansive language of the statute belies the notion that Congress was concerned exclusively with this problem." *Id.*

This Court has noted that Congress did not legislate in a vacuum - the Act was "motivated in large part by comity concerns," and "the principle of comity which predated the Act was not restricted by its passage." *Fair Assessment*, 454 U.S. at 110. The Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully*, 429 U.S. at 73. Against this backdrop of comity, the Court has properly "interpreted and applied the Tax Injunction Act as a 'jurisdiction rule' and a 'broad jurisdictional barrier.'" *Farm Credit Servs.*, 520 U.S. at 825

> Too little consequence has been attached to the fact that the courts of the states are under an obligation equally strong with that resting upon the courts of the Union to respect and enforce the provisions of the Federal Constitution as the supreme law of the land, and to guard rights secured or guaranteed by that instrument. We must assume--a decent respect for the states requires us to assume--that the state courts will enforce every right secured by the Constitution.
>
> 209 U.S. at 176 (Harlan, J., dissenting).

(quoting *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976)).

In *California v. Grace Brethren Church*, this Court stated that "Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes." 457 U.S. 393, 411 (1982). Respondents would conflate both terms into a single administrative function – the collection of taxes. This limitation on the Act contradicts this Court's observation that the Act's scope extends beyond the mere collection of taxes. *Farm Credit Servs.*, 520 U.S. at 823.

Respondents below relied on *Jefferson County v. Acker*, 527 U.S. 423 (1999), to support their incorrect interpretation of the text of the Act. Appellants' Brief at 14. Respondents' reliance is misplaced. The Tax Injunction Act bars suits restraining "assessment, levy or collection" of state taxes. 28 U.S.C. § 1341. However, *Jefferson County* involved a suit by a county to collect occupational taxes from federal judges. 527 U.S. at 427. This Court held the county's suit was not barred by the Act because it was "not brought to restrain state action." *Id.* at 433-34. At the same time, this Court reaffirmed the principle that the Act's "statutory text 'is to be enforced according to its terms' and should be interpreted to advance 'its purpose' of 'confin[ing] federal-court intervention in state government.'" *Id.* at 433 (citing *Farm Credit Servs.*, 520 U.S. at 826-27). By its very terms, the Act did not apply. Thus, *Jefferson County* is inapposite to this suit brought by taxpayers to restrain state action.

Several appellate courts have properly realized the broad purpose of the Act. The Sixth Circuit has directly held that that the Tax Injunction Act bars federal court jurisdiction in actions that not only interfere with the collection of taxes, but also the assessment and levy of taxes. *Gillis*, 836 F.2d at

1005. The *Gillis* court reasoned, "While admittedly the great majority of cases present plaintiffs seeking to enjoin the collection of taxes, and certainly the most direct threat to the state fisc is presented when the collection of taxes is enjoined, still the Act is not, by its own language, limited to the *collection* of taxes." *Id.* (emphasis added). In reaching this decision, the Sixth Circuit relied on *Grace Brethren* and noted that the language should be interpreted to accomplish this principal purpose. *Id.*

In *Colonial Pipeline Co. v. Collins*, the Eleventh Circuit also held that the Act should be interpreted according to its purpose. 921 F.2d 1237, 1242 (11th Cir. 1991). The court stated:

> In assessing whether a complainant's claim runs afoul of the Tax Injunction Act, we must look not only at whether the literal terms of the statute are implicated, but also at whether the requested relief requires such an exercise of federal judicial power as to collide with the broad purposes of the act.

Id.

Ironically, until this case, the Ninth Circuit treated the Act in a similar fashion. In *Poer and Co. v. Counties of Alameda*, the Ninth Circuit held that the Act barred federal court jurisdiction, although the language of the Act did not cover the action. 725 F.2d at 1236. The Ninth Circuit stated that "the efficacy of the Act's jurisdictional bar could be readily circumvented if the federal courts exercised jurisdiction over tax refund actions." *Id.* Because the "operation of the Tax Injunction Act would be frustrated," the court prohibited federal court jurisdiction over tax refund actions. *Id.* The court relied on its earlier decision, *Dillon v. State of Montana*, 634 F.2d 463 (9th Cir. 1980), in which the

Ninth Circuit held that the Act "is meant to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems." *Poer,* 725 F.2d. at 1236. In *Dillon*, the Ninth Circuit looked to the action's "practical effect on state fiscal operations," and held that the Act barred federal court jurisdiction because it "discern[ed] no significant distinction between the intrusiveness" of the action requested and those "undoubtedly forbidden by § 1341." 634 F.2d at 466. There can be no doubt that Respondents are asking for "intrusion" into Arizona's complex tax administration system that implements a variety of state goals via tax deductions, tax credits, surcharges, penalties, etc.

The clearest statement of the Ninth Circuit's interpretation of the Act is worth quoting at some length:

> We do not think the primary purpose of the Tax Injunction Act was to remedy the inequitable financial advantage enjoyed by foreign corporations in state tax matters. . . . It is true that Congress was concerned about the financial drain on state resources resulting from foreign corporations withholding large sums of money pending the outcome of protracted tax litigation in the federal courts. However, had Congress enacted the Tax Injunction Act solely to address this inequity, it could have limited the Act's jurisdictional bar to federal diversity actions. . . . The Court has long recognized the dangers inherent in disrupting the administration of state tax systems, and the corresponding need for federal court restraint when deciding cases that will affect these delicate state operations. The Court's reluctance to interfere with the assessment and collection of state taxes was evident long before the enactment of the Tax Injunction Act. . . . The independent functioning of state tax systems, which the Tax Injunction Act sought to

> safeguard, would be undermined by allowing federal district courts to exercise jurisdiction over actions such as [this]. Given the congressional concern for state fiscal autonomy, we do not believe Congress intended such a result.

Ashton, 780 F.2d at 822-23 (citations omitted).

Examining the cases where the Ninth Circuit has barred claims on the remote fringe of a state taxation scheme highlights the panel decision's departure from the proper interpretation of the Act and its purpose in this case. For example, the Ninth Circuit held that the Act barred a constitutional challenge to a state constitution's provision limiting a veterans' property tax exemption to residents. *Mandel*, 494 F.2d at 367. The Ninth Circuit noted, "[T]he strong public policy of federal noninterference with state taxation schemes has been statutorily embodied" in the Act. *Id.* at 366. The court recognized that the ability to avoid payment by filing in federal court "would pose a grave threat to the operation of a fiscal system of a state." *Id.* at 365. Moreover, the Ninth Circuit reasoned, "[T]he allowance of an immediate federal remedy would ignore traditional doctrine foreclosing such relief until after the alternative remedies at law have been demonstrated to be inadequate." *Id.* at 365-66. The court looked to *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971), in which Justice Brennan explained:

> The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules.

Mandel, 494 F.2d at 366. In *Mandel*, the Ninth Circuit held that the Act barred federal court jurisdiction because the tax exemption in that case must fall somewhere under "assessment and collection of state taxes" and "administration" of the state taxation scheme. *Id.* at 366-67. Likewise, the tax credit in this case also falls within "assessment" and the administration of the state taxation scheme, so the Act prohibits federal court jurisdiction. So, too, Arizona's tax credit is one of the "established rules" that is part and parcel of the state's complex procedures for assessing and collecting taxes.

The Ninth Circuit has also held that the Act prohibits federal court jurisdiction where there is an indirect restraint on the assessment of taxes. *Blangeres v. Burlington N., Inc.*, 872 F.2d 327, 328 (9th Cir. 1989). In *Blangeres*, the court stated that the requested injunction would preclude states "from taxing Burlington Northern employees because the states would be unable to obtain the information necessary for assessment." *Id.* According to the court, the injunction would "restrain assessment" of state taxes, so "[t]he fact that the injunction would restrain assessment indirectly rather than directly does not make the Tax Injunction Act inapplicable." *Id.*

In *Comenout v. State of Washington*, 722 F.2d 574 (9th Cir. 1983), the Ninth Circuit reinforced its view that the Act serves as a "broad jurisdictional impediment." *See also Jerron West, Inc. v. State of Cal., State Bd. of Equalization*, 129 F.3d 1334, 1338 (9th Cir. 1997), *cert. denied*, 525 U.S. 819 (1998); *Dillon*, 634 F.2d at 466. The *Comenout* court held that the Act not only barred federal court jurisdiction over a challenge of state excise taxes, but also barred claims against state agents and local police, who were enforcing the tax laws. 722 F.2d at 577-78. The court held that the Act

barred claims of unlawful arrest, assault, damages for lost business, recovery of confiscated goods, and an injunction to prevent the state from entering property. *Id.* The Ninth Circuit held that the Act deprived the court of jurisdiction because maintenance of the suit "would interfere with the enforcement of the state tax scheme." *Id.* at 578. Because the Ninth Circuit has held that claims outside the state's taxation scheme were barred by the Act, surely the Act also bars claims concerning tax credits that are within the state's taxation scheme.

The overwhelming theme throughout these cases is the extremely broad scope of the Tax Injunction Act. In contrast, the Ninth Circuit has ignored the scope of the Act to reach its narrow interpretation, which is inconsistent with comity, this Court's and other circuits' jurisprudence, and even its own prior holdings. The Ninth Circuit also erred in its reading of the Act's legislative history.

2. The Tax Injunction Act's legislative history conflicts with the Ninth Circuit's decision.

One of the reasons this Court has interpreted the language of the Act broadly is because "[n]either the legislative history of the Act nor that of its precursor, 28 U.S.C. § 1342, suggests that Congress intended that federal-court deference in state tax matters be limited to the actions enumerated in those sections." *Fair Assessment*, 454 U.S. at 110. For example, this Court interpreted the Act to bar both injunctive and declaratory relief in state tax cases - even though the Act itself is silent regarding declaratory relief. *Grace Brethren Church*, 457 U.S. at 408.

The Ninth Circuit and Respondents clearly wish that the Act's text referred only to the "collection" of taxes. As the Act also explicitly refers to "assessment," the Ninth Circuit

selectively read the Act's legislative history to conclude erroneously that "there would be no violation of the purposes or policy underlying the Tax Injunction Act" if Respondents' suit continues in district court. *Winn*, 307 F.3d at 1016. In the Ninth Circuit's view, the only possible reason to refuse jurisdiction is if the federal lawsuit threatened to drain the state coffers. *Id.* at 1017. This mechanical threshold is completely at odds with the Act's legislative history.

Certainly the legislative history encompasses the idea that the Act prohibits interference with the collection of taxes. *See* S. REP. No. 1035, at 1-2 (1937); H.R. REP. No. 1503, at 2 (1937). However, to end the inquiry at that point is to ignore not only the language, but also the evident philosophy of federalism that the Act embodies: that the Act is designed to allow state courts to decide questions of state tax law without federal court interference. 81 CONG. REC. 1,417 (1937) (statement of Senator Bone) ("Why not . . . [let] the State courts settle State controversies and confine Federal courts to the settlement of Federal questions?") The legislative history notes that Congress believed it a sufficient "safety valve" for this Court to have the final say in correcting any misinterpretations by a state supreme court. S. REP. No. 1035, at 2 (1937) ("An appeal to the Supreme Court of the United States is available."); H.R. REP. No. 1503, at 2 (1937) (same); 81 CONG. REC. 1,417 (1937) (statement of Senator Bone) ("[The Act] does not take away any jurisdiction of the Supreme Court.").[8] The Act's legislative history clearly supports non-interference by the federal judiciary in this case.

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[8] In denying *certiorari*, this Court has already declined to look for any error with the Arizona Supreme Court's reasoning. *See Kotterman*, 528 U.S. at 921.

CONCLUSION

Federal courts should refrain from interfering in Arizona's fiscal interests, its social and economic goals for providing the tax credit, and its taxation scheme. "Deductions and credits are legitimate tools by which government can ameliorate the tax burden while implementing social and economic goals." *Kotterman*, 972 P.2d at 613. Arizona should be free to pursue its "imperative need . . . to administer its own fiscal operations." *Rosewell*, 450 U.S. at 522. This Court should reverse the Ninth Circuit and hold that comity and the Act deprive the district court of subject matter jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

J. ELLIOT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Tax Injunction Act, 28 U.S.C. § 1341, or principles of comity, divest a federal district court of jurisdiction over a suit to enjoin a state tax credit.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* and their members have a compelling interest in legal issues that affect state and local governments.

The Court has long "recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981). Both "Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration" as manifested by both the Tax Injunction Act, 28 U.S.C. § 1341, and the comity doctrine. *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995).

The court of appeals nonetheless held that neither the Act nor principles of comity bar federal district court jurisdiction over a suit to enjoin a state tax credit. The court so held notwithstanding that Arizona provides an adequate remedy to challenge a tax credit in the state courts. The court's holding is contradicted by the plain text of the Act and would defeat the statute's purpose. Moreover, the comity doctrine is a further bar to this suit.

Because the court of appeals' holding poses a substantial threat to the effective administration of state tax systems,[2] *amici* submit this brief to assist the Court in its resolution of the case.

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

[2] This case presents no question regarding the validity of Arizona's STO credit.

SUMMARY OF ARGUMENT

1. The Tax Injunction Act (TIA) prohibits a federal district court from enjoining a state tax credit where, as here, a State provides "a plain, speedy and efficient remedy" in its courts. 28 U.S.C. § 1341. The plain text of the TIA bars a federal court from enjoining the "assessment . . . of any tax under State law." *Id.* This language is naturally understood as barring a federal court order enjoining any aspect of the scheme by which the State calculates a taxpayer's bottom line liability.

Authorities contemporaneous with the TIA's enactment establish that the term "assessment" means "determining the share of a tax to be paid by each of many persons," *Black's Law Dictionary* 151 (3d ed. 1933), or "to determine what a taxpayer shall contribute to the public." 1 *Bouvier's Law Dictionary and Concise Encyclopedia* 256 (8th ed. 1914). More recent authorities are to the same effect. *See, e.g.*, *Webster's New International Dictionary* 166 (2d ed. 1955). The process of assessment necessarily includes the reduction of a taxpayer's liability by taking credits allowed by the applicable tax code. *See* Jerome R. Hellerstein & Walter Hellerstein, *State and Local Taxation* 980 (6th ed. 1997).

The court of appeals nonetheless reasoned that Arizona's STO credit does not involve an assessment of a tax because it "is applied to the calculation of taxes *after* a taxpayer's gross income has been determined and therefore plays no part in the 'assessment' of . . . income as a basis for the imposition of taxes." Pet. App. 16a. The court's construction is contradicted by the text of the TIA, which specifically states that its jurisdictional limitation applies to "the assessment . . . of any tax," 28 U.S.C. § 1341, and not just to the assessment of income for the purpose of taxation. Indeed, under the court's reasoning, the TIA would not prohibit a federal court suit seeking to enjoin Arizona's personal exemptions and various deductions, both of which are accounted for on the State's tax

return below the determination of adjusted gross income. Moreover, a State may impose tax add-backs below the determination of taxable income. Under the court of appeals' definition of "assessment," the TIA would not prohibit a federal court suit challenging these provisions.

2. The court of appeals further reasoned that the TIA does not bar suits seeking to enjoin a tax credit because a federal court order invalidating a tax credit would not diminish the State's ability to raise revenue. Pet. App. 20a. According to the court, the Act "does not preclude federal courts from taking actions designed to increase the revenues available to the states, nor to remove unconstitutional barriers to the states' collection of the full amount of taxes they have levied or assessed." *Id.* at 23a.

Contrary to the views of the court below, this Court has recognized that the TIA has the broader purpose of "prevent[ing] federal-court interference with the assessment . . . of state taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982). Furthermore, "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *Id.* at 409 n.22. The court of appeals' holding thus violates the TIA's fundamental purpose of non-interference with state tax administration even if a federal court order enjoining the STO credit would enhance Arizona's revenues.

Furthermore, the court of appeals' reasoning rests on the facile assumption that federal court orders enjoining tax credits will increase state revenues. One taxpayer's credit, however, may be another taxpayer's unconstitutional discrimination. *See, e.g., Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 805 (1989). Taxpayers might later invoke a federal judgment in state proceedings to demand refunds arguing that the constitutionality of the tax was *res judicata*.

Moreover, while it is unclear whether a federal judgment can be used to collaterally estop a state official, other taxpayers who were not parties to the federal proceeding might invoke this doctrine in state court refund suits. Thus, contrary to the holding of the court of appeals, suits challenging tax credits pose a substantial threat to state revenues.

The court's holding violates the TIA's non-interference principle for a further reason. Here, the Arizona courts have already adjudicated the validity of the STO credit and this Court has twice denied review. At best, a federal court judgment upholding the credit will needlessly waste the resources of the State in defending a statute that has already been upheld by the Arizona courts. At worst, a federal court judgment invalidating the credit will sow confusion and uncertainty by creating two conflicting judgments, neither of which has precedence over the other. It places state officials in the difficult position of risking being held in contempt by a federal court for enforcing a statute which the courts of a co-sovereign have upheld or disregarding their obligations under the state constitution to enforce state law.

3. The court of appeals further erred in reversing the district court's alternative holding that principles of comity bar federal jurisdiction over this suit. Contrary to the views of the court of appeals, *see* Pet. App. 23a-26a, the principle of federal non-interference in state tax matters is supported by an extensive line of cases and is of far broader application than acknowledged by that court.

The non-interference principle embodied in the comity doctrine is based on the recognition that the States are co-sovereigns in our federal system. This Court has catalogued the numerous reasons which underlie the non-interference principle. *See Fair Assessment*, 454 U.S. at 108 n.6 (other citation omitted).

Several of these policy concerns apply with equal force to tax credit challenges. For example, allowing tax credit challenges to be brought in federal court would subvert the States' remedial processes. Such challenges are also extraordinarily intrusive as they compel state officers to appear in federal court whenever a taxpayer challenges a credit. Furthermore, such challenges could result in conflicting judgments, subjecting state officials to incompatible legal obligations and throwing state tax administration "into disarray." *Id.* Finally, taxpayers could invoke federal judgments invalidating tax credits to assert that state officials must provide refunds. Thus, federal court jurisdiction over tax credit challenges is as potentially disruptive to state tax administration as is jurisdiction over any other taxpayer suit. Where, as here, a State provides an adequate remedy to challenge a tax credit, the comity doctrine bars a federal district court from exercising jurisdiction over the suit.

ARGUMENT

BOTH THE TAX INJUNCTION ACT AND PRINCIPLES OF COMITY BAR A FEDERAL COURT SUIT TO ENJOIN A STATE TAX CREDIT

As manifested by both the Tax Injunction Act (TIA), 28 U.S.C. § 1341, and the Court's comity jurisprudence, "Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration." *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995). The court of appeals nonetheless held that "a federal action challenging the granting of a state tax credit is not prohibited by [either] the Tax Injunction Act," Pet. App. 20a, or principles of comity. *See id.* at 23a-26a.

According to the court of appeals, "[t]he invalidation of a tax credit . . . does not adversely affect the state's ability to raise revenue," *id.* at 20a, and therefore "[t]he Tax Injunction

Act does not preclude federal courts from taking actions designed to increase the revenues available to the states, nor to remove unconstitutional barriers to the states' collection of the full amount of taxes they have levied or assessed." *Id.* at 23a. Applying the same reasoning, the court also rejected the State's assertion that the comity doctrine barred federal court jurisdiction. *See also id.* at 26a.

As explained below, the plain meaning of the Tax Injunction Act bars federal district court jurisdiction over this suit. Moreover, the court of appeals' superficial view that a federal court challenge of a state tax credit is permissible because an injunction will result in more revenues to the State is erroneous. Many federal tax challenges are based on the theory that the State is unconstitutionally favoring one class of taxpayers over another; an injunction could always be sought in federal court on the purported theory that the court's order would result in the State collecting more revenues. Affirmance of the court of appeals' holding would thus eviscerate the TIA's jurisdictional bar and the federal policy of non-interference in state tax administration. The judgment of the court of appeals should therefore be reversed.

A. Taxation Is A Core Sovereign Function

No function of government is more essential to sovereignty than the assessment and collection of taxes. *See Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830). "[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935). As the Court recognized more than 130 years ago, "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).

The Court has accordingly "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council*, 515 U.S. at 586. Underlying this policy in part is the practical consideration that "[t]he procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules." *Fair Assessment In Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108 n.6 (1981) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)).

Thus, even before the enactment of the Tax Injunction Act in 1937, this Court had repeatedly held that "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that [federal equitable] relief should be denied in every case where the asserted federal right may be preserved without it." *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). *See also Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913); *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276 (1909). And even after the TIA's enactment, the Court, declining to reach the issue of whether the Act barred a federal court from granting a declaratory judgment invalidating a state tax when no injunction was sought, held that principles of comity barred the suit. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300-01 (1943).

More recently, the Court has held that "the principle of comity" bars "§ 1983 actions against the validity of state tax systems in federal courts." *Fair Assessment*, 454 U.S. at 116. Rather, "taxpayers must seek protection of their federal rights by state remedies, provided . . . that those remedies are plain,

adequate, and complete, and may ultimately seek review of the state decisions in this Court." *Id.* at 116 (footnote omitted). "[I]n light of the strong background principle against federal interference with state taxation," the Court has further held that "§ 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists." *National Private Truck Council*, 515 U.S. at 589. As these cases demonstrate, the comity doctrine's principle of non-interference with state tax administration is of broad application and is essential to the preservation of the federal-state balance.

B. The Tax Injunction Act Bars Federal District Court Jurisdiction Over Respondents' Suit

1. The Tax Injunction Act is but "one manifestation" of the "aversion to federal interference with state tax administration." *Id.* at 586. While it is only a "partial codification of the federal reluctance to interfere with state taxation," *id.* at 590, the Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (citations omitted). As the Court has further explained, "Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982).

The Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. As the Court has explained, "[t]he statute, on its face, yields no exception to the jurisdictional bar save where the state remedy is wanting." *Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 823 (1997).

The Court has further stated that "the legislative history of the [Act] demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *Grace Brethren Church*, 457 U.S. at 409 n.22. Recognizing both the Act's role in protecting "the federal balance" and "the basic principle that statutory language is to be enforced according to its terms," the Court has instructed that "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Farm Credit*, 520 U.S. at 827.

As an initial matter, respondents cannot contend that federal court jurisdiction over their suit is needed because of Arizona's failure to provide, in the TIA's words, "a plain, speedy and efficient remedy" to challenge the STO tax credit. Indeed, shortly after the STO credit was enacted, a similar suit was fully litigated in the Arizona courts. The Arizona Supreme Court rejected this challenge in "a thoughtful and scholarly opinion on the merits of the constitutionality of the tax credit." *See* Pet. App. 7a (Kleinfeld, J., dissenting from denial of rehearing en banc) (citing *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999)). Thereafter, this Court denied two separate petitions for a writ of certiorari. *See Kotterman, cert. denied*, 528 U.S. 921 (1999); *Rhodes v. Killian, cert. denied*, 528 U.S. 810 (1999).

The court of appeals nonetheless rejected the State's argument that federal district court jurisdiction over respondent's challenge to the STO credit is barred by the Tax Injunction Act. *See* Pet. App. 15a-23a. The court dismissed the State's contention that "the STO tax credit is part of Arizona's general system of tax 'assessment[,]'" because it "is part of the overall calculus by which the state determines how much revenue it will receive from each taxpayer." *Id.* at 16a.

Instead, the court of appeals adopted an insupportably narrow construction of the term "assessment." In the court's view, the term "has two definitions relevant to the question presented in this case: (1) 'to estimate officially the value of (property, income, etc.) as a basis for taxation,' and (2) 'to impose a tax or other charge on.'" *Id.* (quoting *Random House Dictionary of the English Language* 90 (1979)). According to the court, respondents' suit does not seek to enjoin the assessment of a state tax because "the STO credit available to a taxpayer is a uniform amount that is applied to the calculation of taxes *after* a taxpayer's gross income has been determined and therefore plays no part in the 'assessment' of . . . income as a basis for the imposition of taxes, and . . . the challenged practice is not the imposition of a tax [but] the grant of a benefit in the form of an excuse from paying a portion of the taxes already assessed." *Id.* at 16a-17a (footnote omitted).

The court further asserted that:

> Whatever a taxpayer contributes to an STO is subtracted directly from his tax bill *after* his income is assessed and his tax liability calculated. From a purely financial perspective . . . a taxpayer is unaffected by his decision as to whether or not to make an STO contribution. The funds that he may contribute will be unavailable to him in any event: they will be used either to make the contribution or to pay the taxes he owes.

Pet. App. 16a-17a n.5. The court thus concluded that a challenge to a tax credit does not "interfere with a state's '*assessment*' of a tax." *Id.* at 21a n.7. *See also id.* at 22a ("the grant of a tax credit . . . is not one of the three types of state tax procedures barred from challenge in federal court by the Tax Injunction Act").

The court of appeals found support for its construction of "assessment" by noting that one of the purposes of the TIA "was to prevent disruption of a state's efforts to collect tax

revenues." *Id.* at 18a. Asserting that it was taking a functional approach, the court broadly held "that a federal action challenging the granting of a state tax credit is not prohibited by the Tax Injunction Act. The invalidation of a tax credit, such as the one at issue here, does not adversely affect the state's ability to raise revenue[,]" but rather, "would . . . enhance[]" state coffers. *Id.* at 20a. Thus, in the event of a ruling on the merits invalidating the credit, "the Act's primary policy of non-interference with state revenue collection would not be undermined in any way." *Id.*

This sweeping holding denies the statutory language its ordinary meaning and disobeys this Court's command that "federal courts must guard against interpretations of the [Act] which might defeat its purpose and text." *Farm Credit*, 520 U.S. at 827. At a minimum, allowing tax credit challenges to be brought in federal court would eviscerate the TIA's fundamental purpose of "prevent[ing] federal court interference with the assessment . . . of state taxes." *Grace Brethren Church*, 457 U.S. at 411. Moreover, it is inaccurate to suggest -- as the court of appeals did -- that such suits will enhance state revenues. Indeed, in most cases, the opposite result is likely to occur as taxpayers who were denied the credit assert that the State engaged in unconstitutional discrimination and demand refunds by invoking the federal judgment to argue that the taxing authority is collaterally estopped from re-litigating its validity.

2. "'The starting point in statutory interpretation is the language [of the statute] itself.'" *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (quoting *United States v. James*, 478 U.S. 597, 604 (1986)) (other citation and internal quotations omitted). When individual words may have multiple definitions, the Court's task is to look at the operative language in "context" and give the statute its "most natural reading." *Id.*

As relevant here, the TIA prohibits a federal court from enjoining "the assessment . . . of any tax under State law."

28 U.S.C. § 1341. Both at the time of the TIA's enactment and today, this phrase is naturally understood as prohibiting a federal court from enjoining any aspect of the scheme by which the State determines a taxpayer's bottom-line liability. As this Court noted shortly before the TIA's enactment, an assessment of income tax "include[s] the calculation and fix[es] the amount of tax payable." *Bull*, 295 U.S. at 259.

Sources contemporaneous with the TIA's enactment confirm this construction. The 1938 edition of *Webster's*, which was copyrighted in 1934, defined "assessment" as "[t]he entire plan or scheme fixed upon for charging or taxing." *Webster's New International Dictionary* 166 (2d ed. 1938). The same edition of *Webster's* defined "assess" as "[t]o determine and impose a tax." *Id.* The 1933 edition of *Black's Law Dictionary* defined the term "assessment" as "determining the share of a tax to be paid by each of many persons; or apportioning the entire tax to be levied among the different taxable persons, establishing the proportion due from each." *Black's Law Dictionary* 151 (3d ed. 1933). The same authority defined the term "assess" as "[t]o adjust or fix the proportion of a tax which each person, of several liable to it, has to pay," or "[t]o calculate the rate and amount of taxes." *Id.*

Another contemporaneous source defined "assessment" as "[d]etermining the share of a tax to be paid by each individual." *The Cyclopedic Law Dictionary* 75 (2d ed. 1922); *see also* 1 *Bouvier's Law Dictionary and Concise Encyclopedia* 256 (8th ed. 1914) (same). In defining "assessment," *Bouvier's* further stated that "[t]o assess a tax is to determine what a taxpayer shall contribute to the public." *Id. See also id.* (defining "assess" as "[t]o rate or fix the proportion which every person has to pay of any particular tax," "[t]o tax," "[t]o fix the value of," and "[t]o fix the amount of"); *see also The Cyclopedic Law Dictionary* at 75 (same).

More recent authorities likewise demonstrate that the term "assessment" means the determination of a taxpayer's bottom-line liability. Since the TIA's enactment, *Webster's* has continued to define "assessment" as "[t]he entire plan or scheme fixed upon for charging or taxing." *Webster's New International Dictionary* 166 (2d ed. 1955); *accord Webster's Third New International Dictionary* 131 (1986). Other authorities are to similar effect. *See Black's Law Dictionary* 116-17 (6th ed. 1990) ("determining the share of a tax to be paid by each of many persons . . . . [i]t fixes the liability of the taxpayer and ascertains the facts and furnishes the data for the proper preparation of the tax rolls"); *id.* (defining "assess" as "[t]o calculate the rate and amount of taxes"); *West's Tax Law Dictionary* 63 (1995) (defining "assessment" as "[t]he amount of tax, penalties, and/or interest charged to a taxpayer's account").

As the forgoing demonstrates, the assessment of a tax is the determination of the taxpayer's bottom-line liability. Put another way, it is the "Tax Due" the government, *see* Arizona Form 140 (Resident Personal Income Tax Return Line 39), whether that amount is determined by the taxing authority (as is commonly the case with property taxes) or whether it is self-assessed as is typical with income taxes. *See* Jerome R. Hellerstein & Walter Hellerstein, *State and Local Taxation* 980 (6th ed. 1997).

This process of assessment necessarily includes the reduction of a taxpayer's tax liability by taking credits allowed by the applicable tax code. As a leading authority explains, in self-assessment "[a]n individual taxpayer . . . prepares a state tax return, reporting her income and deductions, *determining her credits*, and ultimately computing her tax liability for the taxable period." *Id.* (emphasis added). Taxpayers use the same process to calculate their federal income tax liability. *See* 26 U.S.C. § 6201(a)(1) ("The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are

made under this title."); *see also* IRS, Form 1040: U.S. Individual Income Tax Return (2003), at 2 (lines 44-53) (lines for inclusion of federal tax credits).[3]

These authorities conclusively refute the court of appeals' assertion that the STO credit does not involve an assessment of tax because it "is applied to the calculation of taxes *after* a taxpayer's gross income has been determined and therefore plays no part in the 'assessment' of . . . income as a basis for the imposition of taxes." Pet. App. 16a. Indeed, the court's construction is contradicted by the text of the TIA, which specifically states that its jurisdictional limitation applies to "the assessment . . . of any tax," 28 U.S.C. § 1341, and not just to the assessment of income for the purpose of taxation.

Moreover, under the court of appeals' reasoning, the TIA would not prohibit a federal court suit seeking to enjoin Arizona's personal exemptions or the various deductions allowed by state law, both of which are accounted for below the determination of adjusted gross income. *See* Arizona Form 140, at 1 (lines 16-18). Most significantly, a State may impose tax add-backs and recapture provisions below the determination of taxable income. *See id.* (line 21); New York State Dept. of Taxation and Finance, Form IT-201: Resident Income Tax Return (2002), at 2 (line 43) (requiring taxpayers to add on other state taxes); *see also* New York State Dept. of Taxation and Finance, Form IT-201-ATT: Itemized Deductions, and Other Taxes and Tax Credits (2002), at 1 (lines 17-26) (listing taxes and credits that must

[3] Under both the Federal Government's and Arizona's tax schemes, taxpayers make a preliminary calculation of tax before deducting the amount of their credits. *See* IRS Form 1040 (2003), at 2 (lines 41, 44-54, 60); Arizona Dept. of Revenue, Form 140: Resident Personal Income Tax Return (2001), at 1 (lines 19, 26-30, 39). Taxpayers do not, however, owe this amount but rather the amount determined by deducting for credits and adding back other taxes and recapture provisions. This final calculation is the amount of the assessment.

be added back). Under the court of appeals' definition of "assessment," the TIA would not prohibit a federal court suit challenging these provisions.

The court of appeals' characterization of a tax credit as "the grant of a benefit in the form of an excuse from paying a portion of the taxes already assessed," Pet. App. 17a, is contradicted by the numerous authorities above which establish that the assessment of a tax is the determination of a taxpayer's bottom-line liability. Tax credits are as integral to determining a taxpayer's liability as are the taxpayer's various sources of income, authorized exclusions from income, deductions, personal exemptions, and the applicable tax rate.[4] Indeed, nearly every State that imposes a personal income tax uses credits in their scheme. *See generally* John C. Healy & Michael S. Schadewald, *2003 Multistate Personal Income Tax Guide* 3-29—3-93 (2003). A taxpayer's failure to pay the amount of "taxes already assessed" as defined by the court of appeals, Pet. App. 17a, does not

[4] That "the STO credit available to a taxpayer is a uniform amount," Pet. App. 16a, does not make it any less a part of the process for assessing an individual taxpayer's liability. While the State has set a maximum amount of the credit, the amount that a taxpayer can take is based on a taxpayer's actual contribution to an STO. *See* Ariz. Rev. Stat. § 43-1089(A). That amount may vary from taxpayer to taxpayer. Moreover, each taxpayer's ultimate tax liability depends upon the taxpayer's income, deductions, exemptions, and credits.

Nor is it relevant in determining whether the STO credit is part of the assessment process that "[f]rom a purely financial perspective . . . a taxpayer is unaffected by his decision as to whether or not to make an STO contribution." Pet. App. 17a n.5. For those who have made STO contributions, the amount of their tax liability is affected. That the State allows taxpayers to take a credit rather than limits them to deducting their contribution in calculating their taxable income, *see id.*, does not make it any less a part of the State's scheme for assessing taxes. Nor do the TIA's text or legislative purpose support the court of appeals' distinction between deductions and credits.

subject the taxpayer to interest and penalties. Rather, a taxpayer incurs interest and penalties by failing to pay the bottom-line liability.

The court of appeals simply disregarded the ordinary meaning of the phrase "assessment . . . of any tax" in order to allow federal court challenges to state tax credits. And as explained below, the court's construction of the TIA defeats the statute's purpose.

3. Purporting to apply a "functional analysis," the court of appeals justified its construction of the TIA by reasoning that a federal court order invalidating a tax credit "does not adversely affect the state's ability to raise revenue. If the STO scheme were to be struck down on Establishment Clause grounds, Arizona's ability to raise revenue would not be diminished; to the contrary, it would be enhanced." Pet. App. 20a. Thus, "[t]he Act's primary policy of non-interference with state revenue collection would not be undermined in any way." *Id.* The court then superficially concluded that "[t]he Tax Injunction Act does not preclude federal courts from taking actions designed to increase the revenues available to the states, nor to remove unconstitutional barriers to the states' collection of the full amount of taxes they have levied or assessed." *Id.* at 23.

Contrary to the views of the court below, this Court has recognized that the TIA has the broader purpose of "prevent[ing] federal-court interference with the assessment . . . of state taxes." *Grace Brethren Church*, 457 U.S. at 411. As the Court has further stated, "the Act was first and foremost a vehicle 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Farm Credit*, 520 U.S. at 826 (quoting *Grace Brethren Church*, 457 U.S. at 408-09) (other citation and quotation marks omitted).

Legislative history supports this understanding of the TIA's purpose. As this Court has explained, "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *Grace Brethren Church*, 457 U.S. at 409 n.22. Contrary to the understanding of the court below, the assertion of federal district court jurisdiction in this case violates the TIA's fundamental purpose of non-interference with state tax administration even if a federal court order enjoining the credit would in this instance enhance Arizona's revenues.

In any event, the court of appeals' reasoning rests on the facile assumption that federal court orders enjoining tax credits will necessarily increase state revenues. In fact, one taxpayer's credit may be another taxpayer's unconstitutional discrimination, as evidenced by numerous cases in which tax exemptions have been challenged as discriminating against those not entitled to take them. *See, e.g., Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 806 (1989) (challenging income tax exemption for retirees of state and local governments); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (challenging tax exemption for locally produced products); *Austin v. New Hampshire*, 420 U.S. 656 (1975) (challenging income tax exemption for state residents); *Dixie Tobacco & Candy Co., Inc., v. Bridges*, 246 F. Supp.2d 502 (M.D. La. 2003) (challenging tax discount for in-state wholesalers).

Contrary to the views of the court below that federal declaratory and injunctive relief invalidating tax credits would result in the State receiving greater revenues, taxpayers might later invoke a federal judgment in state proceedings to demand refunds arguing that the constitutionality of the tax was *res judicata*. Moreover, while it is unclear whether a federal judgment can be used to collaterally estop a state

official, other taxpayers who were not parties to the federal proceeding might invoke this doctrine to seek refunds in state court proceedings. *Compare Benjamin v. Coughlin*, 905 F.2d 571, 575-76 (2d Cir.) (applying non-mutual collateral estoppel to state officials), *cert. denied*, 498 U.S. 951 (1990), *with Yniguez v. Arizona*, 939 F.2d 727, 737 (9th Cir. 1991) (noting "uncertainty" whether non-mutual collateral estoppel applies to state official). *See also United States v. Mendoza*, 464 U.S. 154, 163 (1984) (holding that non-mutual offensive collateral estoppel does not apply to a suit against federal government).

The morass created by the court of appeals' rule is of particular concern for States such as Arizona. Under Arizona law, a taxpayer asserting that a tax was not "lawfully due" is not required to file a protest at the time of payment in order to later seek a refund. *See Pittsburgh & Midway Coal Mining Co. v. Arizona Dept. of Rev.*, 776 P.2d 1061, 1064 (Ariz. 1989). Rather, the protest requirement applies only when there is "a dispute between the taxpayer and the state at the time of payment." *Id.* at 1066. Moreover, under Arizona law, taxpayers have four years to file a refund claim. *See Smelkinson v. Arizona Dept. of Rev.*, No. 1814-99-TC, 2000 Ariz. Tax LEXIS 19, at *5 (Ariz. Tax Ct. 2000) (citing Ariz. Rev. Stat. § 42-1106(C)). The Arizona Supreme Court has also recently held that in a class action refund suit only the representative of the class is required to exhaust the State's administrative remedies and the filing of the representative's claim tolls the statute of limitations for all other class members. *See Arizona Dept. of Rev. v. Ladewig*, 29 P.3d 862, 869-70 (Ariz. 2001). Thus, contrary to the assertion of the court of appeals, allowing federal suits to challenge state tax credits creates a substantial threat to state revenues because of the large number of taxpayers who could file refund claims and the fact that those refund claims could cover multiple tax years.

Finally, even if there are some tax credit challenges that may not subject a State to retroactive liability, jurisdictional rules should be clear. The application of the TIA should not depend on a further inquiry by a federal court into the effect of a federal injunction on a State's finances. Indeed, such an approach not only manifestly interferes with Arizona's administration of its income tax, it also "defeat[s] [the] purpose and text" of the TIA, which divests federal district courts of jurisdiction over challenges to state taxes except for when a State's remedies are "wanting." *Farm Credit*, 520 U.S. at 823.

4. The court of appeals' holding also violates the TIA's purpose of preventing federal court interference with state tax administration by wasting state resources and inviting systemic confusion. Here, the Arizona courts have already adjudicated the validity of the STO credit and this Court has twice denied review. *See Kotterman*, 972 P.2d at 625; *cert. denied*, 528 U.S. at 921; *see also Rhodes*, 528 U.S. at 810.

At best, a federal court judgment upholding the credit will needlessly waste the resources of the State in defending a statute that has already been upheld by the Arizona courts. Such duplicative litigation will also consume the time of the federal courts, as this case illustrates. *See* Pet. App. 27a-36a (district court order dismissing case for lack of subject matter jurisdiction).

At worst, a federal court judgment invalidating the credit will sow confusion and uncertainty by creating two conflicting judgments, neither of which has precedence over the other. It places state officials in the difficult position of risking being held in contempt by a federal court for enforcing a statute which the courts of a co-sovereign have upheld or disregarding their obligations under the state constitution to enforce state law.

Ultimately, and after years of litigation, this Court will be required to resolve the conflict. The exercise of federal district court jurisdiction in this case would thus not only directly conflict with the TIA's non-interference principle as a doctrinal matter, it would also lead to the confusion and uncertainty that the Act is intended to prevent. *See Grace Brethren Church*, 457 U.S. at 409 n.22, 411.

C. The Comity Doctrine Bars Federal District Court Jurisdiction Over This Suit

The court of appeals further erred in reversing the district court's alternative holding that this Court's comity jurisprudence precludes federal jurisdiction over respondents' suit. The court supported its ruling on this point by mischaracterizing the district court's holding as a "broad bar to the litigation of federal constitutional claims in federal court [which] is unsupported by precedent." Pet. App. 23a.

According to the court of appeals, this Court "has twice held federal jurisdiction to be barred by the doctrine of comity" in state tax challenges. *Id.* at 23a; *see also id.* at 23a-25a (citing *Fair Assessment*, 454 U.S. at 115, & *Great Lakes Dredge*, 319 U.S. at 297). The court explained that these were "cases in which the plaintiffs sought to stop the collection of a tax; thus, they are fundamentally different from the instant case." *Id.* Repeating its dubious premise that invalidation of the STO credit would enhance state revenues, *see* discussion *supra* 17-19, the court further reasoned that "Arizona identifies no harm that renders federal court review of this statute any more intrusive on the state's sovereignty than the review of any other state statute that is alleged to be unconstitutional." Pet. App. 26a. The court thus concluded that the comity doctrine "does not bar plaintiffs' attempt to vindicate the important constitutional rights at issue" and reversed the district court's order dismissing the case. *Id.*

The court of appeals' holding manifests a superficial and incomplete understanding of the history and scope of the comity doctrine in state tax matters. Contrary to the understanding of the court, the principle of federal non-interference in state tax matters is supported by a far more extensive line of cases than the two cited by the court. Indeed, the principle can be traced back at least as far as *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871), and is supported by numerous cases. *See* discussion *supra* at pp. 5-8. It is also of far broader application than acknowledged by the court below. *See, e.g., National Private Truck Council*, 515 U.S. at 589 (holding "in light of the strong background principle against federal interference with state taxation" that "§ 1983 does not call for either federal or state courts to award injunctive or declaratory relief in state tax cases when an adequate legal remedy exists"); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 51 (1990) (noting that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation); *First Nat'l Bank v. Board of Comm'rs*, 264 U.S. 450, 454-56 (1924) (holding that failure to exhaust state administrative remedy bars refund suit in federal court).

The non-interference principle embodied in the comity doctrine is based on the recognition that the States are co-sovereigns in our federal system. *See, e.g., Fair Assessment*, 454 U.S. at 108 (quoting *Matthews v. Rodgers*, 284 U.S. at 525) ("'The scrupulous regard for the rightful independence of state governments which should at all time actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that [injunctive] relief should be denied in every case where the asserted

federal right may be preserved without it.'"). In *Fair Assessment*, the Court catalogued the numerous reasons which underlie the non-interference principle:

> The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

454 U.S. at 108 n.6 (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)).

Several of these policy concerns apply with equal force to tax credit challenges. As a general matter, allowing tax credits challenges to be brought in federal court would subvert the State's remedial processes. Furthermore, as explained at pp. 17-20, *supra*, such challenges are extraordinarily intrusive as they "would hale state officers into federal court every time" a taxpayer challenged a tax credit. *Id.* at 115. Moreover, such challenges could result in conflicting judgments and subject state officials to incompatible

legal obligations and thus throw state tax administration "into disarray." *Id.* at 108 n.6. Indeed, respondents' purpose in bringing this litigation in federal court is to obtain a judgment that conflicts with the Arizona Supreme Court's decision upholding the credit. *See Kotterman*, 972 P.2d at 616. Finally, as explained above, in many instances taxpayers could invoke federal judgments invalidating tax credits to assert that state officials must provide refunds. Federal court jurisdiction over tax credit challenges is thus as "potentially disruptive" to state tax administration as is jurisdiction over any other taxpayer suit. *National Private Truck Council*, 515 U.S. at 591.

Nor can it be forgotten that in the *Kotterman* suit, the Arizona courts provided a full and fair hearing on the same federal claim raised by respondents. The judges of the Arizona courts "take the same oath to uphold the federal Constitution that [federal judges] do." Pet. App. 8a (Kleinfeld, J., dissenting from denial of rehearing en banc). Indeed, "[t]he Arizona Supreme Court provided a thoughtful and scholarly opinion on the merits of the constitutionality of the [STO] credit," *id.* at 7a, which this Court twice declined to review. That a panel of a federal court of appeals may not agree with the Arizona Supreme Court's judgment is a patently insufficient basis to disregard the non-interference principle, which is the essence of the comity doctrine.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The Supreme Court of the United States

J. ELLIOTT HIBBS,
Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND THE TERRITORY OF GUAM AND COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Did the Ninth Circuit err in holding, in conflict with the First, Fifth, Sixth and Eleventh Circuits, that the Tax Injunction Act, 28 U.S.C. §1341, and principles of comity that traditionally restrain federal judicial interference with state tax systems do not require district courts to dismiss constitutional challenges to state tax credits that directly impact the administration of a State's tax system?

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BRIEF IN SUPPORT OF PETITIONER

The Amici States, Puerto Rico and Guam, respectfully submit this brief as *amici curiae* in support of Petitioner in accordance with the provisions of Rule 37.4 of the Supreme Court Rules.

INTEREST OF *AMICUS CURIAE*

In the instant matter, the Ninth Circuit Court of Appeals concluded that the proscriptions of the Tax Injunction Act, 28 U.S.C. §1341 (hereafter "Act"), should not apply to the state tax-administration process as an institution of state government that is broadly described by the Act itself as comprising "assessment, levy [and] collection." Rather, in the appellate court's view, the proscriptions should apply *only* to the enumerated activities specified within the phrase, narrowly defined. In this case, then, the court construed "assessment" to exclude calculation of tax "credits," rendering the latter activity vulnerable to federal injunctive relief.

Amici States all impose taxes that provide credits and/or exemptions for certain taxpayers.[1] Tax credits are

[1] The 44 States that impose tax based upon personal income provide for credits and/or exemptions for certain taxpayers. See CCH State Tax Guide (All States) (2003) ¶15-110 (chart); *id.* at ¶¶15-206 (Alabama), 15-216 (Alaska), 15-236 (Arizona), 15-251 (Arkansas), 15-266 and 15-266a (California), 15-281 (Colorado), 15-293 (Connecticut), 15-311 (Delaware), 15-365 (Georgia), 15-371 (Hawaii), 15-386 and 15-386a (Idaho), 15-397 (Illinois), 15-405 (Indiana), 15-431 (Iowa), 15-446 and 15-447 (Kansas), 15-459 (Kentucky), 15-473 (Louisiana), 15-489 (Maine), 15-506 (Maryland), 15-521 (Massachusetts), 15-534 and 15-534a (Michigan), 15-551 (Minnesota), 15-581 and 15-581a (Missouri),

(Continued on following page)

15-596 and 15-597 (Montana), 15-609 (Nebraska), 15-637 (New Hampshire), 15-654 (New Jersey), 15-671 and 15-671a (New Mexico), 15-684 (New York), 15-701 and 15-702 (North Carolina), 15-715 (North Dakota), 15-729 (Ohio), 15-746 (Oklahoma), 15-760 and 15-760a (Oregon), 15-773 (Pennsylvania), 15-796 (Rhode Island), 15-806 (South Carolina), 15-832 (Tennessee), 15-866 (Utah), 15-881 (Vermont), 15-896 (Virginia), 15-925 (West Virginia), 15-941 (Wisconsin). The District of Columbia also provides for credits in its personal income tax law. *Id.* at ¶¶15-326 and 15-326a.

The 46 States that impose tax based upon corporate income provide for credits and/or exemptions for certain taxpayers. See CCH State Tax Guide (All States) (2003) ¶10-060 (chart); *id* at ¶¶10-204 and 10-206 (Alabama), 10-220 and 10-221 (Alaska), 10-236 (Arizona), 10-251 (Arkansas), 10-263a and 10-263c (California), 10-281 and 10-281b (Colorado), 10-295 (Connecticut), 10-309 (Delaware), 10-339a and 10-339b (Florida), 10-356 (Georgia), 10-371 (Hawaii), 10-836 (Idaho), 10-400 (Illinois), 10-412 and 10-415 (Indiana), 10-430 (Iowa), 10-444 (Kansas), 10-456a and 10-456c (Kentucky), 10-476 and 10-476c (Louisiana), 10-490 and 10-490b (Maine), 10-505 (Maryland), 10-517 and 10-517b (Massachusetts), 10-534 and 10-534b (Michigan), 10-551 (Minnesota), 10-564 and 10-564b (Mississippi), 10-581 (Missouri), 10-597 and 10-597b (Montana), 10-610 and 10-610b (Nebraska), 10-631 (Nevada), 10-640 (New Hampshire), 10-655 and 10-655b (New Jersey), 10-671 (New Mexico), 10-686 (New York), 10-699 (North Carolina), 10-714 (North Dakota), 10-729a (Ohio), 10-746 and 10-746b (Oklahoma), 10-761 and 10-761b (Oregon), 10-773 and 10-773c (Pennsylvania), 10-791 (Rhode Island), 10-806 (South Carolina), 10-836 (Tennessee), 10-866 and 10-866b (Utah), 10-880 (Vermont), 10-896 (Virginia), 10-925 (West Virginia) and 10-939a (Wisconsin). The District of Columbia also provides for credits in its corporate income tax law. *Id.* at ¶10-326.

South Dakota, Washington and Wyoming do not rely on income taxes, but like most States impose general property taxes, see CCH State Tax Guide (All States) (2003) ¶¶943 (South Dakota), 949 (Washington), 952 (Wyoming), which are subject to exemptions and credits. *Id.* at ¶¶20-817 (South Dakota), 20-907 (Washington), 20-952 (Wyoming). Texas imposes a corporate franchise tax, *id.* at ¶5-845, which is subject to credits and exemptions. *Id.* at ¶¶5-848 and 5-849. Washington also imposes a business and occupation tax, *id.* at ¶949, which is subject to exemptions and credits. *Id.* at ¶60-915.

(Continued on following page)

an integral part of state tax policy and practice. See CCH State Tax Guide (All States) (2003) ¶335 ("state tax philosophy [is] based on an elaborate network of deductions, credits and exemptions. . . . "); RIA All States Tax Guide ¶236 (2003) (noting that credits against state corporate income taxes are allowed to encourage business development and growth). *Amici* States therefore share Arizona's concern that the proscriptive sweep of the Act not be undermined by overly clever parsing of its terms to evade its intended purpose of preserving state taxation free from unnecessary[2] district court interference.

SUMMARY OF ARGUMENT

Fundamental to the ideal of our Union as a federated system of governments is the principle that the power to tax is to be exercised *"concurrently"* by the States and the government of the Union, and that it is to be exercised by the government of the States *"without abridgment"* by the

Most States also impose sales and use taxes, see CCH State Tax Guide (All States) (2003) ¶60-101 (table), which are subject to exemptions and credits. *See, e.g., id.* at ¶¶60-100 (chart); 60-120 (chart); 60-130 (chart); 60-140 (chart); 60-231 and 60-235 (Arizona); 60-261 and 60-265 (California); 60-336 (Florida); 60-531 and 60-535 (Michigan); 60-850 (Texas); 60-906 and 60-910 (Washington); and 60-935 (Wisconsin).

[2] The rulings of both the Ninth Circuit and the district court recognize *sub silentio* that the district court petitioners had an adequate and available alternative remedy in the Arizona state courts; otherwise, there would have been no need for the Court of Appeals to address the scope of the Act's jurisdictional bar. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999), *see also Rhodes v. Killian*, 528 U.S. 810 (1999) (certiorari also denied). *Amici* take no position on the merits of the claim that the tax credits at issue violate the Establishment Clause.

government of the Union. *McCulloch v. Maryland*, 17 U.S. 316, 425 (1819). Over a century ago, this Court recognized that *any* federal court interference with state taxing power jeopardized the delicate balance of federalism. *Dows v. Chicago*, 78 U.S. 108, 110 (1871). Indeed, the Act was passed by Congress after this Court's watershed holding in *Ex parte Young*, 209 U.S. 123 (1908), to confirm the continuing vitality of the fundamental principles of federalism and comity that dictate restraint against unnecessary federal judicial interference in state taxation. *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 102-03 (1981).

The Court of Appeals suggests that the Act should be construed narrowly to preserve district court jurisdiction. But construction of the Act, like construction of any other statute defining federal court jurisdiction, is dictated by Congress' role under the Constitution in creating the district courts and defining the scope of their power. As this Court has repeatedly recognized, district courts have only such jurisdiction as Congress chooses to provide. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). In this case, the language of the Act is clear and comprehensive. As a limitation on district court power, its restrictions "must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

And evasion was precisely the purpose of the Ninth Circuit here, parsing Congress' comprehensive description of the state taxing process – "assessment, levy [and] collection," 28 U.S.C. §1341 – into constituent activities, narrowly defined. The effort is unreasonable; the assessment of a tax liability must necessarily encompass calculation of any credits and exemptions to which the taxpayer may be entitled. And the appellate court's simplistic

approach to complex state taxing schemes is demonstrative of the kind of mischief and confusion that will result if the Act is construed to permit district courts to hamhandedly reach into the state taxing process in order to decide which of the constituent processes, calculations, and procedures may be subjected to federal judicial control.

Amici respectfully urge the Court to reverse the judgment of the Ninth Circuit Court of Appeals.

ARGUMENT

THE TAX INJUNCTION ACT MUST BE CONSTRUED REASONABLY TO ENCOMPASS THE ENTIRE PROCESS OF STATE TAX ADMINISTRATION, WITHOUT PARSING THAT PROCESS INTO CONSTITUENT SUB-PROCESSES IN ORDER TO EVADE THE ACT'S PROSCRIPTIONS AGAINST UNNECESSARY FEDERAL COURT INTERFERENCE

A. Important Principles Of Federalism, Reflected In Both This Court's Jurisprudence And In The Tax Injunction Act, Bar District Court Interference With State Tax Administration When State-Court Remedies Are Available

When the Constitution's Framers "split the atom of sovereignty," *U.S. Term Limits v. Thornton*, 514 U. S. 779, 838 (1995) (Kennedy, J. concurring), they recognized that the States' taxing power was an essential element of state sovereignty, which could not be abridged by the federal government:

> [T]he individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. . . . [T]hey would under the plan of the Convention retain that authority in the most absolute and unqualified sense; and . . . an attempt on the part of the national Government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of this Constitution.

The Federalist No. 32, at 199 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Even before Congress enacted the Act, this Court had "uniformly concluded that federal courts cannot enjoin collection of state taxes when a remedy at law is available." *National Private Truck Council, Inc. v. Oklahoma,* 515 U.S. 582, 589 (1995). Underlying those decisions was the fundamental importance of tax revenue to state sovereignty: the "power to tax is basic to the power of the State to exist." *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 826 (1997). Over 130 years ago, this Court recognized that *any* interference with state taxing power jeopardized the delicate balance of federalism:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes may derange the operation of government, and thereby cause serious detriment to the public.

Dows v. Chicago, 78 U.S. 108, 110 (1871).

Though originally couched in terms of prudential restraints on the exercise of equity jurisdiction, see *e.g., Great Lakes Dredge & Dock Co. v. Hoffman*, 319 U.S. 293 (1943), judicial restraint from interference with state taxation matters has long been recognized by this Court as being informed by those fundamental principles of comity that are essential to "Our Federalism." *McNary*, 454 U.S. at 103. Indeed, as the Court has observed, the Act was enacted to ensure the continuity of these fundamental principles after this Court's landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), holding that federal courts may enjoin state officers from enforcing an unconstitutional law. In passing the Act, Congress "recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *McNary*, 454 U.S. at 102-03; *Farm Credit Services,* 520 U.S. at 826-27 ("Enactment of the [Act] reflects a congressional concern to confine federal court intervention in state government, a concern prominent after . . . *Ex parte Young*. . . . ")

It is against this backdrop of constitutional jurisprudence and policy that the scope of the Act must be evaluated.

B. Construed To Effect Its Purposes, The Act Proscribes Unnecessary Federal Court Interference With All Of The Constituent Processes And Sub-Processes Of State Tax Administration

1. Construction of the Act begins with a recognition that district courts are not courts of general jurisdiction. It can no longer reasonably be disputed that federal district courts have only such jurisdiction as Congress chooses to confer on them. *Kokkonen*, 511 U.S. at 377; *Sheldon v. Sill*,

49 U.S. 441, 448 (1850) (upholding Judiciary Act's prohibition of circuit courts from "taking 'cognizance of any suit to recover the contents of any promissory note or other chose in action' [under specified conditions]"). The burden of establishing the existence of jurisdiction lies with the party asserting it. *Kokkonen*, 511 U.S. at 377, citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936). And this Court has made clear that congressional limits on federal jurisdiction "must be neither disregarded nor evaded." *Kroger,* 437 U.S. at 374.

In this case, Congress' withholding of jurisdiction from federal courts is plain and unequivocal. The Act reads:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. §1341.

The language is also sweeping in its compass. This Court has emphasized that, "[g]iven the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Farm Credit Services,* 520 U.S. at 827; see also, *National Private Truck Council,* 515 U.S. at 590-91 (the Tax Injunction Act is "but a partial codification of the federal reluctance to interfere with state taxation.") The Act's purpose was manifestly "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981).

The Act "on its face, yields no exception to the jurisdictional bar save where the State remedy is wanting." *Farm Credit Service,* 520 U.S. at 823; but see *Department of Employment v. United States*, 385 U.S. 355, 358 (1996) (consistent with principles of federalism, the Act is no bar to the United States suing to protect itself from unconstitutional state exactions). Indeed, this Court has understood Congress' policy directive to be so evident and clear that the Court would read the Act to encompass even actions for declaratory relief, *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *cf.*, *Great Lakes Dredge & Dock Co.,* 319 U.S. 293 (principles underlying the Tax Injunction Act justify declining declaratory judgment jurisdiction), and to constitute an exception to the otherwise sweeping and intentionally intrusive federal remedy under 42 U.S.C. §1983. *McNary*, 454 U.S. 100; see also, *National Private Truck Council,* 515 U.S. 582 (§1983 provides no basis for courts to issue injunctive or declaratory relief in state tax cases when there is an adequate remedy at law).[3]

2. But, as is said, "the devil is in the details,"-and the Ninth Circuit posits that exceptions to the Act's proscriptions lurk in Congress' very choice to describe the whole of

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[3] In this regard, the Ninth Circuit mistakenly relied on *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) to justify circumvention of the Tax Injunction Act. *Mitchum* involved reconciliation of the "Anti-Injunction Act," 28 U.S.C. §2283, and the responsibility of federal courts under 42 U.S.C. §1983. The Court there concluded that injunctions under section 1983 were within the exceptions contemplated by Congress in the language of the Anti-Injunction Act. However, as this Court noted in *Farm Credit Services*, the Tax Injunction Act "on its face, yields no exception to the jurisdictional bar save where the State remedy is wanting." *Farm Credit Services*, 520 U.S. at 823.

a State's taxation process comprehensively, by reference to its three major aspects. Thus, where Congress intended the term "assessment" to describe the whole process of calculating the tax liability, the Court of Appeals reasoned that an "assessment" is the end-product – conceptually independent of all that led up to it – and may be distinguished from a "tax credit." But that court's purported distinction for purposes of evading the proscriptions of the Act, is neither reasonable nor practical.

The term "assessment," as used in the Act, must be understood to relate to an entire process of calculating a tax liability, not merely to the end result. Indeed, this understanding is reflected in Congress' use of the term in the Internal Revenue Code, 26 U.S.C. §6201(a)(1) ("[T]he Secretary shall assess all taxes shown on tax returns") and §6203 ("[A]ssessment shall be made by recording the liability of the taxpayer"). Thus, a State's "assessment" of a taxpayer's tax liability necessarily entails calculation and consideration of tax credits. As the district court correctly noted below, in declining to exercise jurisdiction: "Congress indicated that the [Tax Injunction Act] is not limited to collection only but was intended to encompass the process that the state uses in its determination of tax liability. Therefore, when the state offers tax credits to reduce tax liability, the credits become an integral part of the State's assessment of each taxpayer's liability." Pet. App. 31.

The amount of tax liability "assessed" is, to be sure, the bottom-line amount owed by the taxpayer, but to determine that amount it is necessary to first determine whether a taxpayer would be eligible for relevant tax credits. A determination of whether a State's tax credits are properly available to a given taxpayer is part of an

"assessment," the "entire plan or scheme fixed upon for charging or taxing." Webster's Third New International Dictionary 131 (1981); see Black's Law Dictionary 116-17 (6th ed. 1990); *cf.*, *American Civil Liberties Union Foundation v. Bridges,* 334 F.3d 416, 421 (5th Cir. 2003) (concluding that a tax "exemption" is part of "the entire plan or scheme fixed upon for charging or taxing.").

Furthermore, not only is tax assessment a process; it is a *complex* process involving state-law distinctions and competing considerations of myriad state tax policies. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (deference accorded state classifications in recognition of complexity of state taxation schemes); *Williams v. Vermont*, 472 U.S. 14, 29 (1985) (discussing the "complex and redundant" . . . "overlapping series of credits and exemptions" built into Vermont's vehicle tax system and the purpose thereof); *cf.*, *Flora v. United States,* 362 U.S. 145, 157 (1960) (noting that, in construing a statute to determine whether the United States has waived immunity to suit by a taxpayer, the Court is concerned with "a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws.") Among the policies informing this Court's construction of the Act is a recognition that federal constitutional issues in tax-adjudication matters "are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Grace Brethren*, 457 U.S. at 410, quoting *Perez v. Ledesma*, 401 U.S. 82, 128, n.17 (1971) (Brennan, J., concurring); see also, *McNary*, 454 U.S. at 108-109, n.6.

C. Selectively Exempting Sub-Processes Of The State Tax Administration Scheme From Coverage Under The Act Would Defeat The Very Purpose Of The Act.

Tax credits, as *Amici* noted in their statement of interest, are an integral part of a complex system of taxation that States rely on for generating revenue and for balancing budgets. Federal court interdiction of what the court perceives to be a tax credit could do substantial violence to the delicately balanced network of taxes, deductions, exemptions, and credits that go into state revenue predictability and stability. The Ninth Circuit's simplistic conclusion in this case that interdiction of a tax credit will necessarily result in a "substantial additional revenue for the state", Pet. App. 26, is an example of such a ham-handed approach to state taxation.

Moreover, federal judicial invalidation of tax credits on constitutional grounds exposes States to demands for recoupment of improperly credited tax monies, calling for recalculation of tax returns, in many cases over a period of several years. In the case presently before the Court, the plaintiff taxpayers demanded that the district court order readjustment of the State's general fund to reflect invalidation of the tax credits. Pet. App. 14.

Federal court interdiction of any part of a state statutory scheme, therefore, will necessarily bring with it disruption of state tax administration and state budgeting. In every case of federal court interference with state tax administration, "the very maintenance of the suit itself intrude[s] on the enforcement of the state scheme." *McNary,* 454 U.S. at 114. And this Court has repeatedly stressed that "[a]ny delay in the proceedings of the officers, upon whom the duty is devolved of collecting the

taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Dows,* 78 U.S. at 110, quoted in *McNary,* 454 U.S. at 102, *Grace Brethren,* 457 U.S. at 410-411 n.23, and *National Private Truck Council,* 515 U.S. at 586. The concern of *Amici* States, therefore, goes beyond the particular question whether a tax "credit" should be considered part of "assessment" for purposes of the Act. *Amici* are equally concerned with the broader implication of the appellate court's reasoning that the words "levy" and "collection" may also be atomized into constituent processes, and that some of those processes may be distinguished from others for purposes of coverage under the Act.

The Act is rooted in "the *imperative* need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.* 429 U.S. 68, 73 (1976) (italics added). Parsing the state tax administration process into sub-activities that may be separately restrained by a district court threatens to eviscerate the comprehensive preclusive effect of the Act by incrementally exempting from its anti-injunction reach component parts of the States' tax administration. This would render the Act virtually useless. If federal courts may pick and choose which parts of a State's tax administration processes are not covered by this Court's "hands off approach," *National Private Truck Council,* 515 U.S. at 586, the States will not be able to effectively predict, assess, or efficiently collect the tax revenues.

CONCLUSION

For the reasons stated, the Court should reverse the judgment of the court of appeals.

Dated: November 14, 2003

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(15)

No. 02-1809

IN THE

Supreme Court of the United States

J. ELLIOTT HIBBS, Director, Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, *et al.*,

RESPONDENTS.

On Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

Interest of Amicus Curiae

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's oldest civil rights law firm. LDF and its Director-Counsel, Thurgood Marshall, litigated *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and numerous other civil rights cases before this Court and the lower federal courts, including suits brought pursuant to 42 U.S.C. § 1983.

In the period following *Brown*, LDF or the NAACP were involved in hundreds of lawsuits through which *Brown* was implemented in our nation. Among these were cases that invalidated various aid programs or other stratagems by which the *Brown* mandate was sought to be evaded. *E.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973) (state-provided textbooks for students attending all-white private schools established in the wake of public school desegregation orders); *Allen v. County Sch. Bd. of Prince Edward County*, 198 F. Supp. 497 (E.D. Va. 1961) (tax credits for contributions to all-white private schools established after public schools were closed in the face of federal court desegregation order).

In none of these suits was the Tax Injunction Act, 28 U.S.C. § 1341, which is the focus of the instant

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[1]Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation.

litigation before this Court, a bar to federal jurisdiction. LDF files this brief as *Amicus Curiae* because of its concern that the result sought by Petitioner here would foreclose the availability of this federal forum for such purposes and to vindicate federal Constitutional rights.

Summary of Argument

The interpretation of the Tax Injunction Act advanced by Petitioner here, and supported by the United States, has never previously been adopted by this Court. It would foreclose the availability of a federal forum to enforce Constitutional rights (such as First and Fourteenth Amendment rights) that are denied by the mechanism of tax deductions, credits, or exemptions. Had this reading of the statutes in question been in place at the time, this Court could well have been unable to decide *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), and it would have lacked subject matter jurisdiction in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), notwithstanding the importance that the Congress attached to the federal forum in enacting 42 U.S.C. § 1983, *see Mitchum v. Foster*, 407 U.S. 225 (1972). Particularly in light of the very substantial time that elapsed between the statute's enactment and the articulation of the interpretation now pressed by Petitioner and the United States, this result is not required by the language or history of the law and should be rejected by this Court.

ARGUMENT

Amicus files this brief to bring to the Court's attention a perhaps as yet unnoticed and undesirable effect of a ruling in favor of Petitioner in this matter, particularly if it is grounded to any extent in arguments that have been presented to the Court by the United States.

In its filing in support of Petitioner, the United States has argued that the statute at issue in this case, the Tax Injunction Act, 28 U.S.C. § 1341, was modeled upon and should be interpreted *in pari materia* with the Anti-Injunction Act enacted in 1867, 28 U.S.C. § 7421(a). Respondents demonstrate in their Brief that the earlier law was not intended to, and has never been read by this Court to, bar all involvement by federal courts in matters of tax administration, but merely to prevent *pendente lite* interruptions of the flow of federal tax collection and tax revenues. Therefore, we believe, the federal tax act offers no support for the broad ouster of federal jurisdiction to, *e.g.*, enforce constitutional rights in § 1983 suits by enjoining the inappropriate granting of tax *exemptions* or tax *credits* by state officials.

A contrary ruling by this Court — especially if it rests explicitly upon the interpretive model proffered by the United States — would have widespread and severe consequences. If it had been in force at the time when *Brown v. Board of Educ.*, 347 U.S. 483 (1954) began to be implemented, as Respondents point out in their Brief it would have foreclosed attacks in federal court on state aid to segregated schools through tax exemption or tax credits such as were involved in *Allen v. County Sch. Bd. of Prince Edward County*, 198 F. Supp. 497, 501-03 (E.D.

Va. 1961), *aff'd in pertinent part sub nom. Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 232-33 (1964).

As Respondents also observe, this reading of the law could create incentives for states to fashion new forms of indirect (tax exemption or credit) aid of debatable constitutionality. A program of state support, through tax deductions or tax credits, for the purchase of textbooks to be used by children attending private schools established to avoid public school desegregation, for example, *see Norwood v. Harrison*, 413 U.S. 455 (1973), could not have been challenged on Fourteenth Amendment grounds in the lower federal courts if the government's interpretation had been accepted at that time.

Far worse, however, is the fact that the government's "*in pari materia*" argument would support a similar interpretation of the federal Anti-Injunction act. Just as the government's argument (had it been the law at the time) would have meant that this Court lacked subject matter jurisdiction in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), the same interpretation of the *federal* Anti-Injunction Act could have meant that the federal courts were without subject matter jurisdiction even to entertain *Green v. Kennedy*, 309 F. Supp. 1127, *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970), *subsequent ruling*, *Green v. Connally*, 330 F. Supp. 1150, *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) and *Allen v. Wright*, 468 U.S. 737 (1984).

Such a wrongheaded interpretation of Congress' intent would have meant that the Court would not have

been able to decide *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). For in that case, the Court would have lost jurisdiction because of mootness had the government been permitted — as it sought to do — to restore the school's tax-exempt status after this Court granted review, see 461 U.S. at 585 n.9. The reason this did not happen was that the United States Court of Appeals for the District of Columbia Circuit did have subject matter jurisdiction[2] to hear a challenge to the government's tax-exemption policy and to issue an injunction *pendente lite* to preserve the *status quo ante* with respect to Bob Jones University or any other institution which maintained a policy of racial discrimination. *See id.*[3]

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[2]In *Wright v. Regan*, 656 F.2d 820, 836 n.52 (D.C. Cir. 1981) (R. Ginsburg, J.), *rev'd on other grounds sub nom. Allen v. Wright*, 468 U.S. 737 (1984), the Court of Appeals held that the Anti-Injunction Act did not apply where the plaintiffs challenged the grant of tax exemptions to segregated private schools. This Court ultimately ruled in *Allen v. Wright* that the plaintiffs lacked standing, but there appeared to be no question of subject matter jurisdiction.

[3]It was not until nearly a year after the *Bob Jones* ruling that this Court read into the Anti-Injunction Act — even when its reach was confined, as it still is, to suits that would reduce the collection of government revenues — an exception where "[Congress] has not provided an alternative remedy," *South Carolina v. Regan*, 465 U.S. 367, 378 (1984). Thus, at the time the injunction issued in the *Wright* case, see *supra* note 2, it is likely that the suit would have been barred if the Anti-Injunction Act were interpreted to apply.

Of course, no one (including, apparently, the United States or the Internal Revenue Service) thought it did apply, and it was not among the reasons given by the District Court for dismissing the suit. *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979), *rev'd sub*

The persuasiveness of the government's argument is further weakened by the fact that it is being urged so late in the history of the tax injunction statutes. Because the Tax Injunction Act limits subject matter jurisdiction, the failure of the parties and of this Court to raise it in *Mueller* or *Nyquist* underscores that the Act simply has never before been read in the manner now advanced by the Petitioner and the government.

It is also surprising, if the government is correct, that the federal Anti-Injunction Act was neither discussed nor relied upon in *Allen v. Wright*. A holding that the lower courts lacked subject matter jurisdiction because of the *statute* — an issue of which the Court must have been aware because it was discussed by now-Justice Ginsburg in the opinion supporting the judgment being reviewed, see *supra* note 2 — would have avoided the constitutional standing decision that the Court announced in *Wright*, an approach to adjudication that under this Court's longstanding traditions is strongly preferable. *E.g.*, *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (Rehnquist, J.) and cases cited.[4]

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nom. Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), *rev'd sub nom. Allen v. Wright*, 468 U.S. 737 (1984).

[4]"'Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.' *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Mobile v. Bolden*, 446 U.S. 55, 60 (1980); *Kolender v. Lawson*, 461 U.S. 352, 361 n.10 (1983), *citing Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This is a 'fundamental rule of judicial restraint.' *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 467 U.S. 138 (1984)." 472 U.S. at 854.

The Court should not change this longstanding reading of the tax injunction acts, especially when to do so would deprive litigants of a federal forum in which to raise Constitutional claims through 42 U.S.C. § 1983. As the Court recognized in construing another federal anti-injunction law, "Section 1983 was . . . a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the peoples federal rights—to protect the people from unconstitutional action under color of state law . . . ." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Nothing in the language or history of the Tax Injunction Act suggests that Congress was departing from this historic purpose in 1937.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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J. ELLIOTT HIBBS,
in his official capacity as Director of the
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v.
KATHLEEN M. WINN,
Arizona taxpayer, et al.,
Respondents.

On Writ of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a national public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state.

People For the American Way Foundation is a nonpartisan, education-oriented citizens organization established to promote and protect civil and constitutional rights. It was founded by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty.

Each of the *amici* organizations has appeared before this Court on numerous occasions, both as counsel and amicus curiae. Both frequently litigate Establishment Clause challenges to the public financing of religious institutions. Because this case will determine where these constitutional questions will be resolved, its resolution is of significant concern to the *amici*.

STATEMENT OF THE CASE

At issue in this case is an Arizona statute that uses state income tax credits to provide funding for primary and secondary school education. Under the Arizona statute, individual taxpayers may reduce their state tax liability by

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[1] Letters of consent to the filing of this brief are on file with the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

making a donation to a school tuition organization (hereinafter "STO"). Taxpayers who make such payments receive a dollar-for-dollar credit against their tax liability, up to a certain fixed amount. The STOs, in turn, are required to use these public funds to provide scholarships for students attending private schools, including religious schools. STO funds cannot be used for public schools. STOs can distribute the funds without regard to the financial need of students and without consideration of the quality of the public school the student would otherwise attend. *See generally* J.A. at 8-14 (Compl. at ¶¶ 4-28).

Before the statute went into effect, it was challenged on its face by persons not party to this case. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999).[2] Although the Arizona Supreme Court rejected the facial challenge (by a 3-2 vote), the court recognized that the actual implementation of the program could present constitutional problems, leaving open the door for an as-applied challenge. *Id.* at 615-16.

By the time the complaint in this case was filed, approximately thirty-five STOs had been established. Virtually all of them were established by religious organizations and gave scholarships exclusively to students of their denominations for attendance at exclusively religious schools. J.A. at 9-12 (Compl. at ¶¶ 15-21). Such religiously exclusive STOs controlled ninety-four percent of the funds, leaving those parents interested in sending their children to secular schools with few if any such schools to choose from and few if any

[2] The *amici* organizations were co-counsel to the plaintiffs in *Kotterman*.

STOs to serve them. J.A. at 13 (Compl. at ¶¶ 25-26).[3]

Respondents filed suit in the United States District Court for the District of Arizona, arguing that the Arizona program violates the Establishment Clause and seeking declaratory and injunctive relief. J.A. at 7-16. Petitioner moved to dismiss on the basis of the federal Tax Injunction Act (hereinafter "TIA"), 28 U.S.C. § 1341, and Eleventh Amendment immunity. J.A. at 17. The district court granted the motion on the basis of the TIA, holding that the Act barred the instant case because the suit was an action to restrain the assessment of state taxes. Alternatively, the district court held that principles of comity independently barred the suit. Pet. App. 27-36.

The Ninth Circuit reversed without dissent. Pet. App. 11-26. It held that the district court's conception of the TIA was indefensible in light of the statute's text, purpose, and implementing caselaw. Pet. App. 16. The Ninth Circuit also rejected the district court's alternative holding, finding that principles of comity were inapposite in a case such as this one, where declaratory and injunctive relief pose no identifiable harm to the state government's taxing scheme.

Petitioner did not file a petition for rehearing or rehearing en banc. The Ninth Circuit, on a motion of one of its judges, requested that the parties brief the issue of whether en banc review should be granted. The Ninth Circuit ultimately voted against reconsideration, Pet. App. 1, with two judges dissenting, Pet. App. 2-10.

[3] All of these facts must be taken as true, given that this case is before the Court on a motion to dismiss. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

SUMMARY OF ARGUMENT

Petitioner argues that the TIA and associated principles of comity "preclude federal court interference with the administration of all phases of a State's tax system." Pet. Br. at 3. This construction is not only inconsistent with the text and history of the TIA, as explained in the respondents' brief and the Ninth Circuit's opinion, but it also would mark a radical departure from the Court's Establishment Clause jurisprudence to date and gravely weaken civil rights protections.

Petitioner and its *amici* also suggest that a consideration counseling against jurisdiction is that the plaintiffs here are seeking a second "bite at the apple." This accusation, however, is unfounded, as the issues raised in this as-applied challenge are distinct from those raised in the facial challenge litigated in *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). But even if the petitioner's allegations of duplicative litigation were true, that would hardly be a justification for expanding the TIA, for the TIA does not prevent relitigation specifically – it prevents litigation altogether. Existing preclusion doctrines are more than sufficient to protect the finality of state court judgments.

ARGUMENT

I. Finding the TIA to Bar Cases Such as This One Would Mark a Radical Departure from Longstanding Jurisprudence and Would Dramatically Undercut Civil Rights Protections

Under the broad reading of the TIA advanced by the petitioner and by Judge Kleinfeld in his opinion dissenting from the denial of rehearing en banc, federal courts are barred from considering "all aspects of state tax administration." Pet. Br. at 20. Two principles ineluctably follow from such a position. The first is that this Court and the courts below it have repeatedly decided cases over which they lacked jurisdiction. The second is that many cases brought under the Establishment Clause and other constitutional provisions will, in the future, be handled by state courts subject to review only by this Court. Both of these principles counsel against the construction of the TIA advanced by the petitioner.

A. This Court and the Lower Federal Courts Have Consistently Understood the TIA Not to Bar Federal Court Challenges of the Kind at Issue Here

Under the petitioner's expansive conception of the TIA, many of this Court's cases should not have proceeded to review; they should have been dismissed for lack of jurisdiction by this Court and by the federal courts below. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), *Mueller v. Allen*, 463 U.S. 388 (1983), and *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) – like the present case – were challenges to state-tax regimes. In all three of these cases, the Court issued a lengthy opinion on the merits of the case. *Nyquist* struck down, on

Establishment Clause grounds, a New York income tax credit aimed at alleviating the cost of private school expenses; *Mueller* upheld against Establishment Clause attack a more limited Minnesota tax credit targeted specifically at certain private school expenses; and *Griffin* affirmed a federal district court's injunction against a county's allowance of tax credits for taxpayer contributions to racially segregated private schools. Moreover, in three other cases, *Byrne v. Public Funds for Public Schools of New Jersey*, 442 U.S. 907 (1979), *Franchise Tax Board of California v. United Americans for Public Schools*, 419 U.S. 890 (1974), and *Grit v. Wolman*, 413 U.S. 901 (1973), this Court summarily affirmed federal court judgments striking down, on Establishment Clause grounds, state tax deductions or credits given to parents whose children attended private schools.

All six of these cases came to the Court through the federal system. *Nyquist*, *Franchise Tax Board*, and *Grit* came directly to the Court from a federal district court (*see Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 350 F. Supp. 655 (S.D.N.Y. 1972), *aff'd in part*, 413 U.S. 756 (1973); *Franchise Tax Bd.*, 419 U.S. at 890; *Kosydar v. Wolman*, 353 F. Supp. 744 (D. Ohio 1972), *aff'd sub nom. Grit v. Wolman*, 413 U.S. 901 (1973)), while *Mueller*, *Griffin*, and *Byrne* came to the Court through the usual federal trial and appellate court process. *See Mueller v. Allen*, 514 F. Supp. 998 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 463 U.S. 388 (1983); *Griffin v. Bd. of Superiors of Prince Edward County*, 322 F.2d 332 (4th Cir. 1963), *rev'd*, 377 U.S. 218 (1964); *Pub. Funds for Pub. Schs. of New Jersey v. Byrne*, 444 F. Supp. 1228 (D.N.J. 1978), *aff'd*, 590 F.2d 514 (3d Cir.), *aff'd*, 442 U.S. 907 (1979). The requested relief in all six of these cases would have been an injunction eliminating the tax deduction or credit, thereby increasing state tax revenues. For the petitioner here – who argues that the TIA applies not only to actions that would

decrease state revenues, but also to actions that would increase them – the exercise of jurisdiction in these cases was manifestly improper.

To be sure, these six decisions – even considered in the aggregate – are not binding precedent on the breadth of the TIA, as it is well established that the Court "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." *United States v. L. A. Trucker Lines, Inc.*, 344 U.S. 33, 38 (1952). Nevertheless, given the obligation of every federal court to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (quotation omitted), and the concomitant duty, when jurisdiction is lacking below, to accept jurisdiction "not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit," *id.* (quotation omitted), it is clear that the conception of the TIA advanced by the petitioner necessarily implies that the Supreme Court overstepped by deciding the merits of all of these cases. This alleged error is particularly inexplicable with respect to *Mueller*, which was written by then-Justice Rehnquist who, less than two years earlier, had written the Court's opinion in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), a case specifically addressing the breadth of the TIA and its associated principles of comity.

The lower federal courts have been as consistent as the Supreme Court in allowing constitutional challenges to tax credits and deductions to proceed, the TIA notwithstanding. None of the lower courts in the six decisions described above applied or even discussed the TIA. Other courts have done the same, refusing to apply the TIA as a bar to challenges to state taxing regimes that would not lead to a decrease in tax revenues:

- *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990) (holding a North Carolina statute exempting Bibles from retail sales and use tax to be unconstitutional).

- *Rhode Island Fed. of Teachers, AFL-CIO v. Norberg*, 479 F. Supp. 1364 (D.R.I. 1979) (holding unconstitutional a Rhode Island income tax deduction for tuition, textbook and transportation expenses related to private school education), *aff'd*, 630 F.2d 855 (1st Cir. 1980).

- *Luthens v. Bair*, 788 F. Supp. 1032 (S.D. Iowa 1992) (upholding tax credits and deductions for private school tuition and purchase of text books)

- *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978) (upholding a Minnesota statute giving an income tax deduction for parents of students attending public and private schools).

- *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996) (holding that the TIA was inapplicable to a claim that the exemptions for religious employers under the Rhode Island unemployment tax statute and Federal Unemployment Tax Act violated the Establishment Clause), *aff'd*, 127 F.3d 184 (1st Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

- *Appling County v. Municipal Elec. Auth. of Georgia*, 621 F.2d 1301 (11th Cir.) (dismissing, on grounds unrelated to the TIA, an action challenging a Georgia ad valorem tax exemption given to owners of a power plant), *cert. denied*, 449 U.S. 1015 (1980).

- *Moton v. Lambert*, 508 F. Supp. 367 (N.D. Miss. 1981)

(involving a challenge to Mississippi statutes that exempted racially segregated schools from certain taxes).[4]

Only a single case (not including the district court in the instant case) has ever found the TIA to bar an Establishment Clause challenge that would result in an increase to state revenues. *See American Civil Liberties Union Found. of Louisiana v. Bridges*, 334 F.3d 416 (5th Cir. 2003). For all of reasons set forth in the respondents' brief, that ruling is inconsistent with the text, history, and purpose of the Act.

The clear import of the caselaw developed by this Court and the lower federal courts over the last forty years, is that the TIA does not operate to bar actions when the requested relief would lead to an increase in state revenue.

B. The Interpretation of the TIA Advanced by Petitioner Would Dramatically Weaken Establishment Clause Protections

The petitioner's expansive view of the TIA would not only render many *past* decisions erroneous, it would bar the federal courthouse door to a broad range of civil rights cases in the future. This result would necessarily impair the vindication of Establishment Clause protections and frustrate the principal purpose of 42 U.S.C. § 1983.

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[4] In *Ascension Lutheran Church v. Employment Sec. Comm'n of North Carolina*, 501 F. Supp. 843, 847-48 (D.N.C. 1980), the court found that a First Amendment challenge to statutes that required parochial schools to pay unemployment compensation tax was barred by the TIA. *Ascension*, however, involved a claim that would have decreased, rather than increased, state tax revenues and thus supports the interpretation of the TIA advanced by the respondents.

1. Disbursements of Public Funds Frequently Implicate Establishment Clause Concerns

Government funding of religious institutions has been of great concern to this Court over the last sixty years. Indeed, it is fair to say that this issue has dominated the Establishment Clause landscape ever since *Everson v. Board of Education*, 330 U.S. 1 (1947). *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenburger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Wolman v. Walker*, 433 U.S. 229 (1977); *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Hunt v. McNair*, 413 U.S. 734 (1973); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970); *Bd. of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968). As the Court has frequently observed, government "sponsorship [and] financial support" of religion were "[p]rimary among those evils" that the Establishment Clause was intended to guard against. *Nyquist*, 413 U.S. at 772; *cf. Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.") (emphasis omitted).

Many of the funding cases decided by the Court have involved state taxing schemes. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970). Yet, under the petitioner's conception of the TIA, the lower federal courts could no longer hear such cases. Indeed, a state legislature could go so far as to grant a tax credit limited to members of a particular faith and the lower federal courts would be powerless to enjoin it. This possibility is far from conjectural. *See Finlator v. Powers*, 902 F.2d 1158, 1159 (4th Cir. 1990) (considering the constitutionality of state tax statutes that specifically exempted the sale of Christian bibles from sales taxes but did not extend the exemption to the holy books of other religions, or any other book); *American Civil Liberties Union Found. of Louisiana v. Bridges*, 334 F.3d 416, 418 (5th Cir. 2003) (considering a similar scheme).[5]

The centrality of funding questions to Establishment Clause jurisprudence is unlikely to abate. Since the inception of "charitable choice" as a part of the 1996 Welfare Reform Act, *see* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S.C.), the provision of public funds to religious institutions has been accelerating at both the state and federal level. *See* Exec. Order

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[5] Of course, the Establishment Clause would not be the only constitutional provision impacted by a broad interpretation of the TIA. Claims brought under other civil rights provisions would similarly be relegated to state court. For example, litigants would no longer be able to raise Free Exercise or Equal Protection challenges to facially discriminatory tax credits or facially neutral tax schemes that are applied in a discriminatory fashion. Tax schemes that distinguish between individuals on the basis of their gender, race, or residency status would also be immune from federal court challenge.

13199, 66 Fed. Reg. 8499 (Jan. 31, 2001) (establishing the White House Office of Faith-Based and Community Initiatives), *reprinted in* 5 U.S.C. § 601. These funding initiatives, which are often implemented through the provision of tax credits and deductions,[6] raise a host of novel questions. *See* Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 972-94 (2003). Under the petitioner's broad view of the TIA, the lower federal courts would be completely excluded from any role in defining the constitutional parameters of these programs.

2. Barring Federal Court Review Would Frustrate the Purposes of Section 1983

The animating principle of 42 U.S.C. § 1983 is that the availability of federal court review is central to the vindication of federal constitutional rights. *See Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (noting that Section 1983 was meant to "open[] the federal courts to private citizens" for violations of "rights secured by the Constitution and laws of the Nation"). Section 1983 was designed to create a parallel system of relief because state courts could not always be relied upon to properly enforce federal rights, whether "by reason of prejudice, passion, neglect, intolerance or otherwise." *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *see also Allen v. McCurry*, 449 U.S. 90, 98-99 (1980) ("[O]ne strong motive behind [Section 1983's] enactment was grave congressional

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[6] *See, e.g.*, FLA STAT. ANN. § 220.187 (enacted 2001, expanded 2003); PA. STAT. ANN. Tit. 24, §§ 20-2001-B *et seq.* (enacted 2001); 35 ILL. COMP. STAT. ANN. 5/201(m) (enacted 1999); MINN. STAT. § 290.0674 (enacted 1999); IOWA CODE ANN. § 422.12(2) (expanded 1998).

concern that the state courts had been deficient in protecting federal rights."). As one legislator put it:

> The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily.

CONG. GLOBE, 42nd Cong., 1st Sess. 459-60 (1871), *cited in Mitchum*, 407 U.S. at 241 n.31.

It is uncontroversial that state judges, who do not have the benefit of life tenure and salary protection and who are often elected into office, face political pressures that federal judges do not — political pressures that tend to be at their greatest in Establishment Clause cases, which often evoke fierce sentiments on all sides. *See, e.g.*, *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 124 S. Ct. 497 (2003); *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *cert. granted sub nom., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384 (2003).[7]

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[7] Some have even argued that federal judges may be, on average, more technically proficient than state court judges. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988). These authors point to the fact that federal judges receive higher salaries than their state counterparts, undergo a rigorous selection process, and typically have more proficient law clerks, smaller case loads, and expertise with federal issues. *See* Neuborne, *supra*, at 1122; Chemerinsky, *supra*, at 257-280.

Indeed, because of the highly inflammatory nature of Establishment Clause cases, some state court judges have gone so far as to campaign on a promise to impede Establishment Clause protections:

> Chief Justice Moore began his judicial career as a judge on the Circuit Court of Etowah County, Alabama. After taking office he hung a hand-carved, wooden plaque depicting the Ten Commandments behind the bench in his courtroom and routinely invited clergy to lead prayer at jury organizing sessions. Those actions generated two high-profile lawsuits in 1995 based on the Establishment Clause . . . . Both suits were dismissed on justiciability grounds. During his campaign for the Chief Justice position in the November 2000 election, then-Judge Moore's campaign committee, capitalizing on name recognition from the lawsuits, decided to refer to him as the "Ten Commandments Judge." . . . As a result, most of his campaign materials, including billboards, television and radio commercials, telephone scripts, and mailings, described him as the "Ten Commandments Judge" or otherwise referred to the Ten Commandments. The central platform of his campaign was a promise "to restore the moral foundation of law." After he was elected, Chief Justice Moore fulfilled his campaign promise by installing the Ten Commandments monument in the rotunda of the Alabama State Judicial Building.

Glassroth, 335 F.3d at 1284-85 (Carnes, J., for a unanimous panel) (citations omitted); *see also Glassroth v. Moore*, 229 F.

Supp. 2d 1290 (M.D. Ala. 2002) (noting the same history), *aff'd*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 124 S. Ct. 497 (2003)). To entrust core Establishment Clause protections to state court judges, who lack the political insulation that Article III judges enjoy, would be to substantially curtail these protections and to betray the purpose of Section 1983.

3. The Potential for Supreme Court Review Is Not an Adequate Substitute for Lower Federal Court Review

To be sure, the petitioner's interpretation of the TIA would not completely bar the federal courthouse door; review could still be sought in this Court. This provides little comfort, however, as this Court is only able to review a small number of cases each year. *See* The Supreme Court of the United States, *The Justices' Caseload* (explaining that the Court issues formal opinions in eighty or ninety cases a year, and that an additional fifty or sixty are handled without plenary review), *available at* http://www.supremecourtus.gov/about/justicecaseload.pdf. This Court must by necessity leave untouched the vast majority of state court judgments. Given the discretionary nature of this Court's *certiorari* jurisdiction, *see* SUP. CT. R. 10, which is typically used "to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law," *Braxton v. United States*, 500 U.S. 344, 347 (1991), there would be no real possibility of federal review for many constitutional infractions.

Moreover, even if this Court could satisfactorily police all state court judgments, plaintiffs would be forced to exhaust the state court process prior to this Court's review, resulting in lengthy delays during which constitutional violations would persist without relief. For these reasons, discretionary review by this Court is inadequate to ensure vindication of the

Establishment Clause and other core constitutional protections.

II. The Respondents Do Not Seek a "Second Bite at the Apple"

The petitioner and its supporting *amici* repeatedly assert that allowing this litigation to proceed in federal court would allow those challenging the law "a second bite at the apple" because the Arizona Supreme Court previously addressed the constitutionality of ARIZ. REV. STAT. ANN. § 43-1089 in *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). *See* Br. of the Hon. Trent Franks et al. (hereinafter "Franks Br.") at 6 ("Respondents seek another bite at the jurisprudential apple."); *accord* Pet. Br. at 3, 10 n.2, 29. But *Kotterman* decided a different question than the one raised here. The plaintiffs in *Kotterman* brought a facial challenge to the Arizona statute. Indeed, the complaint there was filed before the statute went into effect. The plaintiffs here are bringing an as-applied challenge that rests on implementation of the statute, a claim that *Kotterman* itself recognized would not be precluded.

Existing preclusion doctrines, such as the principles of res judicata, adequately preserve the finality of state court judgments. The defendants did not raise a res judicata defense in this case, *see Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002) ("Plaintiffs assert that principles of res judicata do not bar the instant action, and defendants have not raised a res judicata defense either here or in the district court."), and even if they had it would have been properly rejected, *see* J.A. at 15 (Compl. at ¶ 33) (noting that res judicata does not apply in this case because "neither Plaintiffs nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation"). Apparently recognizing that existing preclusion doctrines do not bar this suit, the petitioner seeks to

employ the TIA as an additional preclusion mechanism. This, however, is a function for which it was not designed.

A. The Claims in *Kotterman*

In *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999), a group of taxpayers brought a challenge to the constitutionality of the statute at issue in this case. In a 3-2 ruling, the Arizona Supreme Court upheld the statute on its face. It is beyond dispute that the issue in *Kotterman* was the facial validity of the statute, as the lawsuit was filed prior to the implementation of the program and, indeed, prior to the effective date of the statute. J.A. at 15 (Compl. at ¶ 33).

The Arizona Supreme Court itself recognized that it was considering a facial, rather than an as-applied, challenge. The plaintiffs in *Kotterman* had argued that because a large majority of private schools – the dissent put the figure at seventy-two percent, *see Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) – were religious in nature, there was no need to wait for the statute's implementation. The Arizona Supreme Court rejected the plaintiffs' argument that there was "an inevitable constitutional breach." *Kotterman*, 972 P.2d at 615. Instead, the court held that the statute on its face was consistent with *Mueller v. Allen*, 463 U.S. 388 (1983), while simultaneously acknowledging the possibility that subsequent developments could give rise to a constitutional problem once the statute was implemented:

> No one yet knows how many taxpayers will take the credit, what dollar amounts will be generated, or how many students will receive tuition scholarships, let alone their statistical distribution among schools. We also cannot

> predict how this tax credit may affect the ratio of secular to sectarian private institutions in the state.

Kotterman, 972 P.2d at 615-16. The Arizona Supreme Court's decision, therefore, is a paradigmatic case of a court rejecting a facial challenge to a statute but leaving open the possibility of a meritorious as-applied challenge in the future.[8]

B. The Claims in the Present Litigation

This case is precisely the one that the court in *Kotterman* anticipated: it raises an as-applied challenge to the statute's implementation. *See* J.A. at 8, 14 (Compl. at ¶ 3, ¶¶ 29-31). To substantiate the as-applied challenge, the complaint lays out a detailed account of how the program is operating in practice. J.A. at 8-14 (Compl. at ¶¶ 4-28); *cf. Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002) ("In their complaint, plaintiffs described how the STO tax scheme has worked in practice."). For example, the complaint explains that ninety-four percent of the funds go to STOs that give grants to students attending only religious schools. J.A. at 10 (Compl. at ¶ 15).

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[8] *Kotterman* was not heard by the Arizona Supreme Court on appeal from an inferior court; it was instead taken by the court as a special action, as a matter of the court's original jurisdiction. *See Kotterman*, 972 P.2d at 610; *see also Randolph v. Groscost*, 989 P.2d 751, 753 (Ariz. 1999) (explaining that the Arizona Supreme Court "ha[s] original jurisdiction over mandamus, injunction, and other extraordinary writs to state officers and exercise that jurisdiction through the special action procedure"). The special action procedure is "highly discretionary," and is typically used only when several criteria are met, one being that the dispute "raises only issues of law" rather than fact. *See Randolph*, 989 P.2d at 753. Thus, the procedure by which the Arizona Supreme Court took the case further highlights the lack of the kind of lower court fact-finding that would accompany an as-applied challenge.

The complaint further asserts that parents who wish to send their children to secular schools may not be able to locate an STO willing to subsidize the tuition. *See* J.A. at 13 (Compl. at ¶¶ 25-26). These facts raise the possibility that the program does not entail "true private choice," a necessary prerequisite to holding the program constitutional. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

Whether or not these facts can be proven or, if proven, whether they would support a violation under *Zelman*'s criteria is of no present relevance given the procedural posture of this case; the only relevant point is that the respondents are seeking to show that the Arizona program is unconstitutional as it is currently operating, a claim that was not raised in *Kotterman*.

C. The "Second Bite at the Apple" Argument Is a Red Herring

Even if the plaintiffs were attempting a "second bite at the apple," this would hardly justify expanding the breadth of the TIA. Doctrines of res judicata – issue and claim preclusion – act to prevent relitigation not only of the "very same claim," but also of all "issue[s] of fact or law actually litigated and resolved in" the earlier litigation. *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001). Because 28 U.S.C. § 1738 makes state law principles of res judicata binding on federal courts, *see Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996), parties losing in state court cannot simply refile in federal court; nor can they attempt to "appeal" their state court losses in federal court, because of the *Rooker-Feldman* doctrine, *see Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). These doctrines adequately serve to protect the finality of state court judgments.

Petitioner and its *amici* suggest, without any foundation,

that these preclusion doctrines are insufficient and that the TIA should be broadened to complement them. *See* Pet. Br. at 3 (arguing that to permit this case to proceed would be to permit "duplicative federal court litigation" and that "[t]he history of the present dispute shows the extent of this unnecessary duplication"); *see also* Pet. Br. at 10 n.2, 29; Franks Br. at 6. Yet, the TIA was never intended for such a task and is hardly tailored for it: the TIA does not prevent *relitigation* specifically; it prevents litigation altogether. Thus, if petitioner's construction of the TIA were accepted, it would bar all litigation, irrespective of whether the state courts had previously ruled on a similar issue.

CONCLUSION

The sweeping interpretation of the TIA advanced by the petitioner is inconsistent with the longstanding jurisprudence of the federal courts, the history and purpose of Section 1983, and prudential considerations regarding the efficacy of state courts to decide controversial Establishment Clause cases challenging state action. The view that an expansive interpretation of the TIA is needed to prevent duplicative litigation is misguided, as current preclusion doctrines amply protect the finality of state court judgments.

Respectfully submitted,

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